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TO AMEND THE ETHICS IN GOVERNMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2214

TO AMEND THE ETHICS IN GOVERNMENT ACT

JUNE 25, 1986

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TO AMEND THE ETHICS IN GOVERNMENT ACT

WEDNESDAY, JUNE 25, 1986

U.S. Senate,
Subcommittee on Oversight
of Government Management,
Committee on Governmental Affairs,
Washington, DC.

The subcommittee met at 2:25 p.m., in room SD-342, Dirksen Senate Office Building, Hon. William S. Cohen (chairman of the subcommittee) presiding.

Present: Senators Cohen, Rudman, and Levin.

Staff Present: Susan M. Collins, staff director; Mary B. Gerwin, majority counsel; Linda J. Gustitus, minority staff director; Elise J. Bean, minority counsel; Frankie de Vergie, chief clerk; and Beth Andrews, intern.

OPENING STATEMENT OF SENATOR COHEN

Senator Cohen. The committee will come to order.

In 1978, the Congress passed the Ethics in Government Act in order to promote public confidence in Government and to increase the accountability of Federal officials. A major element of this law was the establishment of a uniform system of financial disclosure for top-level officials and employees in all three branches of the Government.

In requiring financial disclosure, the Congress endorsed the principle espoused by Justice Brandeis that "sunlight is the best disinfectant." Congress believed that when the private interests of public servants are matters of record, they can be monitored to determine whether conflicts of interest exist.

The issue before the subcommittee today is what sanctions should be used to enforce the financial disclosure reporting requirements. Should the Department of Justice continue to use both criminal and civil penalties in enforcing the law, or should civil and administrative sanctions be the exclusive remedies?

To date, the Department of Justice has used the Criminal False Statement Act to indict at least one public official in each branch of Government for submitting false statements on financial disclosure reports. The most publicized of these cases was the conviction of Congressman George Hansen for failing to disclose over $300,000 in loans and profits on his financial disclosure reports filed for 1978 through 1981. Congressman Hansen was fined $40,000 and sentenced to 5 to 15 months in prison for these violations, and his conviction was upheld on appeal.

This hearing will consider S. 2214, legislation introduced by Senators Hatch and Cranston that would prohibit the Justice Department from proceeding criminally against officials who intentionally falsify their Ethics Act forms. Under this bill, only civil penalties could be imposed for public officials who knowingly file false financial disclosure reports. Moreover, the bill would be retroactive to the date of the enactment of the Ethics Act.

As we will hear in testimony today, the sponsors of S. 2214 believe the Department of Justice and the courts have misinterpreted congressional intent in passing the Ethics Act. They contend that the civil penalties contained in the Ethics Act itself, and not the criminal penalties found in the False Statements Act, should be used to prosecute intentional false statements on financial disclosure forms.

Discerning the intentions of the authors of laws is, of course, never easy, but the proponents and opponents of S. 2214 can point to statements made during the floor debate on the Ethics Act that support their point of view. It is worth noting, however, that the courts have specifically rejected the argument that Congress never intended for criminal penalties to apply to the falsification of financial disclosure reports.

In addition to examining questions of legislative history, the subcommittee is going to explore the future ramifications of making public officials only civilly liable for financial disclosure violations. It will consider, for example, whether exempting these officials from criminal liability would result in a double, more lenient standard being applied to public officials than to private citizens who make false statements to the Government.

The subcommittee is also going to explore whether the passage of this legislation would send a signal to the public that Congress is retreating from its commitment to strong ethics or, conversely, whether subjecting Federal officials to criminal sanctions for reporting violations is simply too harsh—a case of the punishment not fitting the crime.

Finally, we will hear testimony on the impact of making the changes proposed by this legislation retroactive.

Over the past 5 years, the subcommittee has reviewed several aspects of the Ethics in Government Act to determine how well the law is working. We have, for example, reviewed and recommended changes in the independent counsel and Office of Government Ethics provisions of the law.

And in each instance, the subcommittee has asked the essential question of whether the Ethics Act is achieving its goal of promoting public confidence in Government. It is the same principle that will guide the subcommittee in its evaluation of S. 2214.

Senator Orrin Hatch was scheduled to be our leadoff witness. Unfortunately, he is engaged in a markup and has asked that his statement be submitted for the record.[1]

So we will turn next to the Department of Justice to testify first.

Before calling upon the Justice Department, I am going to yield first to Senator Levin, who has a statement, and then to Senator

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[1] See p. 44.

Rudman for any comments he wishes to make, and then we will proceed with the witnesses. Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator **Levin**. Thank you.

Mr. Chairman, the bill that is the subject of the hearing today presents us with a number of challenging issues. To what extent can or should Congress repeal criminal sanctions retroactively? Should financial disclosure requirements be immune from criminal sanction? Should we negate successful criminal prosecutions that were legitimately conducted? Would carving out an exception for criminal prosecution under 18 U.S.C. 1001 for false financial disclosure statements create or appear to create a double standard? If so, would such a double standard be justifiable?

These issues are matters of serious public concern. Concern over the ethical conduct of public figures has indeed been heightened in the last few years with the numerous stories of abuses—some alleged and some proven—from former Deputy Secretary for Defense, Paul Thayer, sent to prison for insider trading, to former top assistance to the President, Michael Deaver, who is the subject of a pending investigation by independent counsel, with 50 cases in between, including a number in the legislative branch.

It is as important now as it was in the post-Watergate era of 1978 to ensure, to the extent laws make it possible to ensure, that public officials will not use their public office for private gain.

One of the best ways to accomplish that is to require disclosure of a public figure's financial matters, and one of the best ways to ensure complete disclosure is to make the penalty for intentional false statements a criminal one.

I look forward to probing the pros and cons of the issues which this bill presents to the subcommittee.

That is the extent of my opening statement.

Chairman **Cohen**. Thank you, Senator Levin. Senator Rudman.

OPENING STATEMENT OF SENATOR RUDMAN

Senator **Rudman**. Thank you, Mr. Chairman. As chairman of the least-sought-after committee of the U.S. Senate, that of the Senate Ethics Committee, I am particularly interested in what develops at this hearing. I am particularly interested in what the witnesses might have to say, at what I view to be some different standards for Members of Congress vis-a-vis the rest of the executive branch and the judicial branch of the Government. So I am interested in hearing the testimony today.

Senator **Cohen**. Our first witness this afternoon will be John C. Keeney, who is the Deputy Assistant Attorney General in the Criminal Division of the Department of Justice.

Mr. Keeney.

TESTIMONY OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE[1]

Mr. **Keeney**. Thank you, Mr. Chairman.

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[1] See Mr. Keeney's prepared statement on p. 25.

Mr. Chairman, I am pleased to be here today to present the views of the Department of Justice with respect to S. 2214, a bill that would amend the enforcement provisions of the Ethics in Government Act.

S. 2214 would limit the penalty for Ethics in Government Act infractions to a $5,000 civil fine, while also making the limitation retroactive to "the date of the enactment of the Ethics in Government Act," which was in 1978.

We believe that the discretion to determine appropriate penalties for violations of Federal law rests ultimately with the Congress, and we defer to your judgment in this case; however, we believe Congress has no authority to enact the retroactivity section of the bill and that, in addition, the retroactivity provision would be an unconstitutional intrusion on the President's constitutional power to pardon.

Since EIGA was passed in 1978, the Justice Department has applied 18 U.S.C 1001, the false statement statute, to EIGA, and the forms required by the EIGA carry specific warnings that 1001 applies to intentionally false statements made on those forms. Nevertheless, it has been Department policy in these cases to bring prosecutions under 1001 only in aggravated cases where the false statements can be shown to have been deliberately designed to conceal improper or illegal conduct and thus can be shown beyond a reasonable doubt to have been made knowingly and willfully.

Whenever this test has not been met, criminal prosecution has been declined. Consequently, indictments under 1001 in cases involving EIGA forms have been authorized in only five cases in the last 4 years.

Mr. Chairman, the retroactivity provisions in sections 2, 3, and 4 of the bill can be read to nullify all criminal convictions under the act since its passage in 1978. If this is the bill's intent, such action would be unprecedented.

We strongly oppose the retroactivity provisions on the grounds that Congress lacks the authority to enact a retroactivity provision, which, as here, would unconstitutionally invade the President's exclusive power to pardon under article II, section 2, clause 1 of the Constitution.

That clause states that the President has the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." By contrast, the Constitution gives the Congress no authority to legislate a pardon for any individual, any particular individual or class of individuals.

There is some precedent, Mr. Chairman, for congessional power in certain limited circumstances to effect the same result that would flow from an exercise of the President's pardon power. However, these circumstances are limited to those involving prospective grants of amnesty or immunity or restoration of civil rights to persons who have not yet been subjected to prosecution by the executive.

In no case we have found has Congress been held to have the power, through self-executing legislation, to grant relief in the form of remission of a prison sentence or monetary fine to individuals who have been convicted of violating a criminal statute.

Mr. Chairman, in sum, we defer to the Congress on the matter of the proper penalties to be assessed for knowingly and willfully false statements made on EIGA forms. However, insofar as S. 2214 would have the effect of voiding or modifying in any respect criminal penalties already imposed as a result of violations of the Ethics in Government Act, we believe it exceeds Congress' power to legislate and would be an unconstitutional intrusion on the President's pardoning power.

Mr. Chairman, that concludes my statement. I will be glad to try to answer any questions you have.

Senator COHEN. Thank you very much, Mr. Keeney.

I'd like to review with you a statement that has been made about the bill before us and just get your assessment of it.

"If this legislation passes, it would mean that if someone applies for a Government position and fills out a 171 form and willfully files false information on that form, that the Government would be entitled to prosecute that person for a violation of section 1001." Is that correct?

Mr. KEENEY. Yes, sir; right.

Senator COHEN. The statement continues: "If the legislation passes, on the other hand, the Congressman who files false forms to his constituents and to his peers, would not be subject to 1001 prosecution."

Mr. KEENEY. As far as it's prospective; yes, sir.

Senator COHEN. To continue: "If an individual goes down to his bank and files a false financial disclosure for a loan, he could be prosecuted for a felony under 1014."

Mr. KEENEY. Yes, sir.

Senator COHEN. But the Congressman or the executive branch official, if there is a decriminalization here, who files false financial information, in the court, to his peers or his constituents, would not be subject to prosecution.

Mr. KEENEY. That's right.

Senator COHEN. OK. Now that statement was made by the Department of Justice last week before Judge Green, when it opposed Mr. Hansen's motion for a reduction of his sentence. And the prosecutor went on to say to the court that "While the Congress is empowered to produce such an anomalous result, I would submit that the court should have nothing to do with encouraging such an anomalous result."

Now has the Department changed its position? You seem to indicate that if it wants to do it prospectively, that's up to Congress. You would object to a retroactive application, because it would intrude upon the ability of the President's authority to pardon. But you seem to imply in your statement that if Congress as a policy matter wants to enact legislation prospectively, it should go ahead.

Mr. KEENEY. Prospectively, yes, sir. Counsel for the Government was arguing there that it was a valid conviction under then-existing law and that it should be upheld, irrespective of what Congress might do with S. 2214.

Senator COHEN. But the implication from that statement was that the Justice Department was arguing even that Congress should not do this. It would produce an anomalous result.

Mr. KEENEY. I'm sorry——

Senator COHEN. In other words, the implication made by the prosecutor in the statement that I read through about the individual citizen versus the public servant was that even Congress shouldn't do it.

Mr. KEENEY. You can read that into his statement; yes, sir.

Senator COHEN. Well, but what I'm saying is that I don't read that into your statement today.

Mr. KEENEY. No, sir. I'm presenting the position of the Department; namely, that it's going to defer to Congress with respect to whether or not criminality should continue in this area.

Senator COHEN. Well, I wrote to the Attorney General back on March 28, asking him to give us the views of the Department of Justice on this bill, and the Department didn't respond to my request. And then again on May 29, I wrote to the Attorney General asking for the Department's view again. I received no response. And despite the position that was taken in court in the *Hansen* case last week, my staff was told by the Department that it did not decide its position on the legislation until 2 days ago.

Now does this reflect some division within the Justice Department, with respect to this legislation?

Mr. KEENEY. It reflects the fact, Senator, that there was a great deal of discussion in reaching an ultimate decision; yes, sir.

Senator COHEN. Why?

Mr. KEENEY. Well, there are people, you know, who believe that the filings required by the Ethics in Government Act are intrusive into the private affairs of individuals. On the other hand, there are people who are of the view reflected by our counsel in the *Hansen* case, that when one deliberately makes a false statement, that person should be subject to criminal prosecution.

Senator COHEN. In addition to the public financial disclosure reports filed by the top-level officials in the executive branch and Members of Congress here in the legislative branch, there are mid-level employees who have to file a private or confidential statement. That is required by Executive Order 11222. Is that right? Are you familiar with that?

Mr. KEENEY. I'm not familiar with 11222. In the executive branch——

Senator COHEN. That's a confidential reporting disclosure form. It's not made public.

Mr. KEENEY. All right. If there is such a filing, it would be subject to 1001; yes, Senator.

Senator COHEN. So if this bill were to pass, then top-level officials in the executive branch would be escaping criminal liability, and yet the midlevel employee, who files a confidential or private disclosure form would be subject to criminal liability.

Mr. KEENEY. Yes; they would, as well as the higher level people who happen to have to file that particular document; yes.

Senator COHEN. If mid-level employees make false statements on confidential disclosure reports filed under Executive Order 11222, then they would be subject to the criminal responsibility, but top-level officials who file public financial disclosure reports would not be criminally liable.

Mr. KEENEY. Well, what it is trying to say, Senator, was to the extent that any governmental official has to file this document, this confidential document, that person would be subject to prosecution for a false statement.

Senator COHEN. Senator Levin, you have some questions?

Senator LEVIN. Yes. I am trying to understand the position of the Department of Justice myself. I've got problems when I read this argument in the *Hansen* matter, in which the representatives of the Department of Justice, Reid Weingarten and James Cole, arguing for the Government, said it would be an "anomalous" result if the Congress adopted this bill.

You seem to say you don't care whether we do or not. Putting aside the retroactive aspect of it, would you say the result of the bill is anomalous, or wouldn't you say it's anomalous?

Mr. KEENEY. Well, Senator Levin, we have to put ourselves in the context of the prosecutors who are arguing for a prosecution that they thought was validly brought and a conviction validly obtained.

There is a bit of anomaly there, with respect to our not taking the same position with respect to S. 2214.

Senator LEVIN. So is that the position of the Department of Justice—that there is "a bit of an anomaly?"

Mr. KEENEY. No; the position of the Department of Justice is, Senator Levin, that we're deferring to the Congress on the criminality aspect.

Senator LEVIN. But when you just said there was "a bit of anomaly"—is that the position of the Department of Justice?

Mr. KEENEY. I'm just expressing my own personal view, Senator, and that the view of the Department of Justice is that we're deferring to Congress on its legislation.

Senator COHEN. Doesn't it strike you as being unusual that the Justice Department is so reticent, when on the average we have very strong opinions expressed by the Justice Department on practically everything we do up here?

Mr. KEENEY. Well, it is not the usual position; you're right——

Senator LEVIN. Isn't it somewhat anomalous, as a matter of fact [laughter] for the Department of Justice not to take a position on this kind of an issue?

Can you remember when the Department of Justice did not take a position on this type of an issue on a bill pending in front of Congress?

Mr. KEENEY. Offhand, I can't direct you to any situation, Senator. I am sure there have been a few, but I can't direct you to any.

Senator LEVIN. Well, are you now going to inform the judge in the *Hansen* appeal—I presume that an appeal is pending from this district court decision—are you going to inform the court of appeals that the Department of Justice has decided to take no position on this bill——

Mr. KEENEY. No, sir.

Senator LEVIN [continuing]. Unlike what the Justice Department argued in the district court, that it was anomalous?

Mr. KEENEY. No, sir; we're not, because an argument was being presented, and it had been presented previously to the court, that it was not the intention of Congress when they enacted EIGA, that there should be criminal penalties. Now we argued against that and were successful. Counsel for Congressman—former Congressman—Hansen pointed to S. 2214 as a example that Congress still felt this way. And I don't think that impacts in any respect on that particular prosecution.

Senator **Levin**. So you don't think that the argument of the U.S. attorney was relevant to the matter in front of the court?

Mr. **Keeney**. I think the argument was relevant, but the argument——

Senator **Levin**. But if it was relevant then, that the bill is anomalous, why isn't it relevant in the court of appeals that it may be or may be not anomalous?

Mr. **Keeney**. It's relevant in response to an argument, Senator Levin, that because of the fact that this committee, this Congress was considering decriminalizing ethics in government filings, that the court should take that situation into consideration in ruling on the *Hansen* motions.

I find nothing inconsistent in those positions.

Senator **Levin**. Well, I think it is inconsistent and, frankly, I'm surprised that the Department of Justice is ducking this. I think that you ought to take a position on it. I think we have to. I think that's what you're there for, to give us recommendations on legislation like this. I generally welcome the recommendations of our Department of Justice, because I think it is important that we have their consideration. The fact that you're unwilling to give us an opinion on a critical issue like this, I think, is ducking your responsibility.

Senator **Cohen**. Could I inquire as to what the Justice Department—assuming we pass this bill—would recommend to the President in terms of whether he should sign it or veto it?

Mr. **Keeney**. I don't know that, sir. I am not prepared to answer that.

Senator **Cohen**. Because we, this particular subcommittee, has been involved in passing—or have recommended passage—of lots of legislation. For example, we had a major dispute with the administration as to whether certain provisions of the Competition in Contracting Act were constitutional. We have always had the benefit of what the Justice Department was going to recommend to the President so we could take it into account.

We might end up passing a bill, and then you turn around and say, Mr. President, we think it is anomalous and you shouldn't be on record as supporting something like this and we are recommending you veto it.

Mr. **Keeney**. Senator, all I can say is I am reflecting the views of the administration on this issue. Whether or not the administration has focused on what they would recommend to the President in the event of enactment, I have no idea.

Senator **Cohen**. I have some more questions, but I will yield to Senator Rudman.

Senator **Rudman**. Well, I just want to follow up with just one question because most of the questions that I would have asked have been asked and answered.

I have read your statement again in the last couple of minutes and I am trying to figure out for myself why you have taken the position you have taken.

Senator Cohen asked you that question, and your answer, if I understood it correctly, was that it took so long to come up with a position because of an essential dispute within the Department concerning the efficacy of financial disclosure at all.

Was that basically your answer?

Mr. KEENEY. Well, as I indicated to Senator Cohen, there are people with varying views, and those were the views—those who believe that the filings themselves are extremely intrusive, some who felt that maybe the filings themselves should be modified in some fashion, and then there were some views that a false statement should be prosecuted.

I am giving you the final decision of the Department, Senator. I didn't go through the rationale with each one of the decisionmakers. I am just communicating what it is.

Senator RUDMAN. Well, I understand, but I am getting to a point here. Obscure as it may be, it will become apparent in a moment.

Then essentially what you are saying is that the disagreement concerned the narrow issue of disclosure forms generally and how they are to be filled out, what the forms required, whether or not they ought to be required, and there is a divergence of view in the Department on that issue.

That was the central issue that caused the Department to take the position it has taken to essentially say we are going to defer to the Congress as to whether or not you wish to impose further requirements or less requirements.

Mr. KEENEY. That is my understanding, Senator. I have no firsthand knowledge. My participation in these was limited, so I am only reflecting what has been communicated to me with respect to those discussions.

Senator RUDMAN. I see.

Mr. KEENEY. But that is what I understand them to be.

Senator RUDMAN. Do you know how high those discussions reached in the Department?

Mr. KEENEY. They went all the way up. The extent to which the highest levels were involved I am not sure, but there was some involvement.

Senator RUDMAN. And in reporting to you what they wanted you to say up here today, essentially all of the important points that they relayed to you are contained in your statement?

Mr. KEENEY. Yes, sir.

Senator RUDMAN. OK. Well, then my question is: after reading this, I first thought before hearing the questions that the reason the Department may have been reluctant to make a recommendation would be based on some notion of separation of powers, and since the Congress essentially would be regulating itself and imposing standards of performance and penalty on its own members, that somehow the Justice Department did not wish to impose its view on the Congress but rather thought that Congress ought to do that unimpeded.

That was not an issue?

Mr. KEENEY. That is not an issue in my mind, Senator. The bill applies across the board to——

Senator RUDMAN. All right.

Mr. KEENEY. There are more executive people affected by this than there are congressional.

Senator RUDMAN. Well, that may be.

Mr. **Keeney**. No; I was not making that distinction.

Senator **Rudman**. That may be. Well, that is fine. If that is your answer, then I truly, too, am somewhat bewildered. This is the first time since I have been sitting here that I have not heard a recommendation from the Department when a representative of the Department was called to testify. I mean, if you had said, we have got a separation of powers problem—that is an issue I know the Department has a lot of concerns about lately—then I would have understood that. And that might have been legitimate, even though it only applies to a fraction of the people covered. They are fairly important people, the 535 people that do file this.

But you are saying that was not an issue. If that was not an issue—now, Mr. Keeney, I respect you and I understand you are here as the messenger with the Department's viewpoint—but for the life of me, I can't understand on such a major issue involving the conduct of public officials that the Justice Department does not come up and say to us either yes or no. I don't understand that.

That does not require an answer. That is just a statement.

Mr. **Keeney**. Thank you, Senator.

Senator **Cohen**. Mr. Keeney, last week, Mr. Stephen Trott, who is the Assistant Attorney General for the Criminal Division, testified that the Department did have a position on the repeal of criminal conflict-of-interest laws. When he testified before Senator Thurmond's committee on post-employment laws, he said the following:

"We believe that these provisions have proven effective tools for enforcement and deterrence."

So the question arises: Why can the Department recommend criminal penalties for these types of conflict-of-interest situations and take no position on criminal sanctions for financial disclosure?

Mr. **Keeney**. Well, on the conflict of interest, our position was that—and I have testified several times on it as has Mr. Trott—we thought the Congress should build on the present section 207 and that there should be a relationship, a nexus as it were, between the activity in which the official engaged while a public official and what he engaged in after he left.

Our position was generally that section 207 was working reasonably well. It had a substantial deterrent effect but the lifetime ban on certain officials was somewhat Draconian.

Senator **Cohen**. But what you indicated was, you think there is a reasonable deterrent with the presence of these conflict-of-interest statutes; it ought to be continued?

Mr. **Keeney**. Yes.

Senator **Cohen**. That is for people who leave Government service—right?

Mr. **Keeney**. Yes.

Senator **Cohen**. So you think that there is a deterrent for people who have left the public service to go into the private sector, that these statutes have a deterrent value. But the position is an anomalous one, through our eyes at least, that those who are currently serving in public office will not have that kind of deterrent—or should not have that kind of deterrence—facing them in the way of criminal penalties?

Mr. KEENEY. I didn't say that, Senator, because I do think that the present statutes do have some deterrence value. I can't measure it because we have only brought four or five cases, but I would have to concede that they do have some deterrent value.

Senator COHEN. Let me ask you a question.

What if we introduce a bill proposing that section 1001 be repealed for all false statements made to the Government and replaced with a civil remedy only? Would the Justice Department have a recommendation as to this or would you defer to us?

Mr. KEENEY. I think we would have a recommendation. We would be opposed. That would be my view.

Senator COHEN. Why would you be opposed to a bill that removes all criminal penalties for false statements applied to everybody—public officials, private officials, private individuals—a bill that treats everybody exactly equally, just civil fines, no more criminal penalties?

Mr. KEENEY. Well, the only argument—the principal argument would be the complexity of the filings under the Ethics in Government Act. Most of the other filings are not nearly so complex—the 1014 bank filing that you have mentioned, the Standard Form 171 could come close——

Senator COHEN. But wait a minute. What you are saying is that because it is more complicated for these public disclosures on the part of public officials, therefore you might want to treat than differently—only civilly as opposed to criminally?

Mr. KEENEY. Because of the complexity, yes.

Senator COHEN. Well, doesn't that give you the flexibility under the Ethics in Government Act? You already have the flexibility to proceed under the Ethics in Government Act on a civil basis for the penalty.

Mr. KEENEY. Yes, sir, we do.

Senator COHEN. For those complicated situations in which a Member of Congress could legitimately make a mistake, inadvertent, perhaps not be as deliberate in the filling out of that report, you have the discretion to proceed civilly?

Mr. KEENEY. Civilly, yes.

Senator COHEN. But when you have an aggravated case or an egregious case of repeated omissions or misstatements, you have, under the False Statement Act, the ability to prosecute criminally, right?

Mr. KEENEY. I guess the argument on the other side, Senator, is that we haven't found that many egregious situations that warranted prosecution and that Congress should take that into consideration in determining whether or not there should continue to be the criminal sanctions.

Senator COHEN. The only point I am trying to make is that it has nothing to do—whether the forms are complicated or not complicated—you have the discretion now not to proceed against any individual who makes an inadvertent or a slightly negligent mistake as opposed to an egregious one, don't you?

Mr. KEENEY. Absolutely.

Senator COHEN. So the complexity of the form or the requirements of the filling out of that form really are quite irrelevant to the issue as to whether or not you want to treat public officials differently from private individuals?

Mr. KEENEY. Yes. I mean, the intrusive nature of the forms, I guess, is the principal argument against it, Senator.

Senator COHEN. I am not sure I quite understand. You say it is intrusive; because you are serving in the Government, you make it public, that is intrusive, and therefore you should be subject to civil penalties as opposed to criminal penalties?

Mr. KEENEY. Some people feel that way, Senator.

Senator COHEN. But a private citizen who files any kind of a false statement, be it time worked for the Government, a false claim for any particular Government benefit, that individual is subject to criminal penalty?

Mr. KEENEY. Well, there is a distinction here because the disclosure statements that are filed by all of us are just that. They are disclosure statements. We are not necessarily getting anything or seeking anything because of the filing of the disclosure statement.

When we file for a bank loan, when we file for Government employment with a 171, we are seeking something. We are seeking a benefit.

Senator COHEN. Then why did you elect to proceed against Congressman Hansen?

Mr. KEENEY. We elected to proceed against Congressman Hansen because the case came within Department of Justice policy guidelines for using 1001 in those situations where there was an underlying reason for the concealment on the Ethics in Government form.

Senator COHEN. But he wasn't getting anything from the Government.

Mr. KEENEY. He wasn't getting anything from the Government, but he was holding back from the Congress, from the Ethics Committee in the House, and he was holding back from his constituency what Congress had determined should be made available.

Senator COHEN. That is a matter of his——

Mr. KEENEY. With respect to his contacts with various people and their relationship to his public office.

Senator COHEN. What harm did he do? If I follow your logic, what harm did he do if you are only concerned about the intrusiveness of the filing of a public disclosure statement? What harm would warrant the kind of criminal prosecution that you brought?

If I understand your logic correctly, you are saying we should draw a distinction. Some feel we should draw a distinction based upon the intrusiveness of the public disclosure statement.

Mr. KEENEY. Well, in that situation it was—the intent of the EIGA in 1978 was to provide for disclosure, provide for disclosure to your peers in Congress and to your constitutents in the executive branch, to your superiors and Congress had mandated that that should be done. In the case of former Representative Hansen it was not done and there was an underlying motivation for not doing it.

Senator COHEN. Let me say that the legislative record is not entirely clear. I can go back to arguments made on the floor. Congressman Eckart, for example, a very distinguished former Member of Congress, argued that the Ethics in Government Act was never intended to apply criminal sanctions. That can be found in the record.

You can also see an equally compelling, and I would say brilliant, analysis made by Chuck Wiggins, former Congressman who served on the House Judiciary Committee. He said, "Wait a minute, for those of you who think that you are wiping out the criminal penalties, you are wrong."

So there is some distinction drawn by the members of Congress at the time they even passed it. The legislative history is not clear.

If that were the case, why did the Justice Department decide to go forward?

Mr. **Keeney**. We decided to go forward, Senator, in accordance with a very restrained policy, which I tried to outline here, because there was an underlying reason for the omission or the falsity in the filing.

And I might mention, Senator, that on the issue of criminal penalties, and I recognize what you are saying, that there were two sides, two points of view in the Congress—that issue was resolved by the courts. We put it to the courts for resolution, and they decided in favor of criminal sanctions being available.

Senator **Cohen**. Well, that comes back to the major point. If criminal sanctions were determined to be made available by the court, in the prevailing view of the Justice Department, why does the Justice Department take no viewpoint now with respect to what we should do in the future?

Mr. **Keeney**. We were deferring to the judgment of Congress, which will take into consideration all the things you have asked me, Senator, and will make a judgment.

Senator **Cohen**. Name, rank, and serial number, right?

I have a number of other questions, Mr. Keeney, and I understand the kind of pressures you are under, and you have managed to handle yourself with some diplomacy up here, but you have, in fact—I think it is pretty clear—not been able to at least explain to us with some degree of clarity exactly why there is reticence on the part of the Justice Department on this issue.

Senator **Rudman**. If the chairman would yield, I would have to just observe, not knowing how this happened, that they may have had a drawing of straws at the Justice Department and Mr. Keeney lost. [Laughter.]

Senator **Cohen**. Senator Levin.

Senator **Levin**. First of all, Mr. Keeney, when you say that those forms are intrusive——

Mr. **Keeney**. I say some people consider them intrusive.

Senator **Levin**. Is that the position of the Department of Justice?

Mr. **Keeney**. It is the position of some of the people in the Department of Justice.

Senator **Levin**. Well, I am asking you for the official position of the Department of Justice, if they have one.

Mr. **Keeney**. It was a factor that was taken into consideration in reaching the judgment, Senator Levin.

Senator **Levin**. Has the Department of Justice suggested that we make those forms less intrusive?

Mr. **Keeney**. It probably would be more acceptable to certain people in the Department if they were less intrusive.

Senator Levin. I am not talking about some people—has the Department of Justice suggested that we make those forms less intrusive?

Mr. Keeney. No, sir, not specifically.

Senator Levin. Why not, if the Department thinks they are too intrusive?

Mr. Keeney. Well, I think we are going back to the original point—is that, you know, Congress enacted the legislation. If you don't think it is too intrusive, it is up to you to decide.

Senator Levin. But don't you make recommendations around here for changes in legislation?

Mr. Keeney. We frequently do, Senator.

Senator Levin. But you haven't in this case?

Mr. Keeney. We have not in this case.

Senator Levin. Yet you use that as the reason for taking no position?

Mr. Keeney. I state that as one of the reasons that was discussed as a basis for taking no position.

Senator Levin. Another reason you give—to differentiate between public officials and everybody else in the world—is that public officials, you are saying, are not getting anything, not receiving a benefit?

And I would tell you that the benefit that they are seeking is probably the greatest benefit that one can seek, which is the public trust.

Mr. Keeney. Senator, I was just making the point that there is a distinction. I wasn't——

Senator Levin. Well, the distinction, if anything, is that we ought to be subject to a higher standard when we seek to govern, than somebody who is seeking sick leave.

You know, somebody here, a guy named Estus, some guy named Ron Estus, in 1976, was convicted after a jury trial on seven counts of an eight-count indictment charging him with submitting false sick leave requests while employed as a mail clerk with the Postal Service.

Senator Rudman. That is pretty serious, Senator Levin.

Senator Levin. Yes. Now, for the Justice Department, setting a real standard here of ethics for the country, that is fine. That poor guy, that postal clerk, it is fine that the criminal statutes apply to him because he filed a false sick leave application.

But when it comes to public officials filing intentionally and wilfully false forms, that is different—you are not going to take a position on that one, because public officials don't seek anything other than the public trust and employment.

Let me tell you, those words that I added—"other than the public trust and employment"—should have been added by you and by the Justice Department.

This is some of the most discouraging testimony I have heard. I have only been around here 8 years, but I will tell you, it is very disappointing to hear the Department of Justice say that they won't tell us what they think about an issue involving ethics in Government.

I just think, again, that you are ducking a very basic responsibility of the Department of Justice. It is not you personally—I understand your position as well—but the Department is ducking, and it is a mistake. I don't think it lives up to the traditions of the Department.

Senator COHEN. Mr. Keeney, thank you very much for coming up and offering us the nonviews of the Department of Justice. [Laughter.]

Mr. KEENEY. Thank you, Senator.

Senator COHEN. Our next witness is Mr. David Martin, Director of the Office of Government Ethics. As head of the OGE, Mr. Martin is the chief ethics official in the executive branch, and we look forward to hearing from this gentleman, who has had many occasions to come before the subcommittee in the past.

TESTIMONY OF DAVID H. MARTIN, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY F. GARY DAVIS, ATTORNEY ADVISER, OFFICE OF GOVERNMENT ETHICS

Mr. MARTIN. Thank you, Senator Cohen.

With me is Gary Davis, a senior attorney on my staff and a career employee on whom I rely implicitly in these sort of things, and if you have any questions to ask him, feel free to do that as well as me.

I will summarize my formal statement [1] very briefly just by saying that since the passage of the Ethics in Government Act we have used a wide variety of options, including civil and criminal sanctions to enforce the reporting parts of the act, and we have used them in a complementary fashion.

Primarily, we rely on civil sanctions unless there is an egregious or some overriding consideration in which case we might recommend—would recommend criminal action.

Principally, the failure to file involves termination reports. That is, when a person leaves, he has 30 days to file a report.

Generally, in that kind of situation, just a letter from us or from the agency that the employee departed is sufficient to get a response.

In the case of a willful misrepresentation—well, in the case of a misrepresentation, if we find it and it is just negligence or ignorance on the part of the individual, we will ask them to amend it, and in most cases that is the end of it. It is amended and promptly.

In the case of, as I said, a willful misrepresentation, then we have presently both a civil and a criminal sanction, which we can use to support enforcement of the reporting requirement.

The administration's position on this bill is that it defers to the judgment of Congress.

Senator COHEN. What?

Let me read something to you, Mr. Martin. I wrote to you about your views on the bill that we are considering today, and I got a letter from you dated April 14 in which you wrote:

"While we do not believe that criminal penalties are appropriate in every case of intentional false filing, we think that they should be available."

Does that remain your view today?

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[1] See Mr. Martin's prepared statement on p. 30.

Mr. **Martin**. That is my personal view, Senator.

Senator **Cohen**. Well, you do speak on behalf of the Office of Government Ethics, don't you?

Mr. **Martin**. I do.

Senator **Cohen**. Yes.

Mr. **Martin**. I am also a part of the administration.

Senator **Cohen**. So the administration has determined that it does not wish to pass any judgment on whether we should maintain the law as it exists despite the fact that you as the chief ethics official believe that it is appropriate to have criminal prosecution discretion available?

Mr. **Martin**. That is how I understand it, yes.

Senator **Cohen**. Your letter went on to say:

> The provisions of 18 USC section 1001 and 5 USC 204 complement each other and, more importantly, they both complement the entire range of criminal conflict of interest provisions.

Is that your personal view, or is that——

Mr. **Martin**. That is still my view.

Senator **Cohen**. That doesn't reflect the view of the Office of Government Ethics?

Mr. **Martin**. Well, I would—Senator, I would say that the great majority of—I would say just about everyone in the Office of Government Ethics has the same view that I do, but——

Senator **Cohen**. Can you tell us anyone who doesn't?

Mr. **Martin**. In the Office of Government Ethics?

Senator **Cohen**. Yes.

Mr. **Martin**. No.

Senator **Cohen**. So it is unanimous then?

Mr. **Martin**. It would be, yes.

Senator **Cohen**. OK. As I read this particular legislation, there is nothing that would alter the application of the law that would deal with confidential disclosures by midlevel executives?

Mr. **Martin**. That is correct.

Senator **Cohen**. So if we were to recommend passage of this bill, then we could have the "anomalous" situation of having congressional and top-level executive branch officials who file public disclosure forms being given a civil penalty at best, while those midlevel personnel in the executive branch who file a confidential statement being prosecuted criminally?

Mr. **Martin**. That is correct, unless I—and I think I read Judge Scalia's opinion correctly. There could be no repeal by implication of the confidential—in other words, if someone tried to make an argument, well, since as to public filings there is no criminal attachments to that, and perhaps by implication Congress meant to have the same provisions apply to confidential statements.

I don't see that that is possible, and so, yes, the answer to your question is people who file a confidential report would still be subject to the criminal provisions of 1001.

Now, may I add something to that?

Senator **Cohen**. Sure.

Mr. **Martin**. I view that as, yes, an anomaly and as an unsatisfactory situation. I think that——

Senator **Cohen**. Does everybody in OGE view it that way as well?

Mr. **Martin**. Well, I can't speak for everyone, but I think that my senior staff would agree with me.

Senator **Cohen**. So you are satisfied, at least in your own mind, that this legislation could create a double standard where criminal penalties could be imposed on mid-level Federal employees and no criminal penalties against top Federal employees?

Mr. **Martin**. I am satisfied that is correct.

Senator **Cohen**. I yield to Senator Levin.

Senator **Levin**. Was there some kind of a discussion with you and OMB and the Department of Justice in terms of your position on this? Did you have a chance to argue your cause in some joint meeting?

Mr. **Martin**. No, I did not attend a joint meeting.

Senator **Levin**. Were you invited to participate before the administration's position was decided?

Mr. **Martin**. I was not.

Senator **Levin**. Well, isn't it a little anomalous——

Mr. **Martin**. Our position was known.

Senator **Levin**. Isn't it a little anomalous that the Director of the Office of Government Ethics isn't invited to argue a position on an issue involving ethics?

Mr. **Martin**. I think your question is self-answering.

Senator **Levin**. Does that mean you agree that it is a little bit anomalous?

Mr. **Martin**. Well, I—but my position was known, Senator. I mean——

Senator **Levin**. Yes; but you also should be invited to argue the merits of your position, shouldn't you? It should not be just "known." If someone is going to decide to do something involving ethics in Government, shouldn't they invite you to argue your position and not just simply get a piece of paper?

Mr. **Martin**. I would think so, but I am not sure there ever was such a meeting. I only know that there were meetings with the Department of Justice, and I was not invited, nor did I feel proper inviting myself to meetings with the Department of Justice where they were debating what position they would take.

Senator **Levin**. Did you submit your testimony to OMB before you brought it with you today or sent it in?

Mr. **Martin**. I did.

Senator **Levin**. Was your original testimony different than the one that we finally got?

Mr. **Martin**. Yes.

Senator **Levin**. So OMB changed your testimony?

Mr. **Martin**. That is correct.

Senator **Levin**. Did you argue with them?

Mr. **Martin**. Well, we presented our position, yes.

Senator **Levin**. In person?

Mr. **Martin**. No.

Senator **Levin**. On the phone?

Mr. **Martin**. By phone.

Senator **Levin**. By phone to OMB?

Mr. **Martin**. Yes.

Senator **Levin**. And they just said what, "it had been decided, sorry," or what?

Mr. **Martin**. Well, the suggestions were transmitted to us over the phone as to what the position—the administration position would be.

Senator **Levin**. So that you were told what the position of the administration was?

Mr. **Martin**. Yes.

Senator **Levin**. Period. And you weren't invited even then to argue your cause?

Mr. **Martin**. No.

Senator **Levin**. Did the OMB tell you who had decided this in the administration?

Mr. **Martin**. I didn't inquire. Now, Mr. Davis did a lot of the phone work on that. Maybe he can answer that.

Senator **Levin**. Mr. Davis, did the OMB tell you who had made this decision?

Mr. **Davis**. No, sir, Senator, they did not.

Senator **Levin**. Did you ask?

Mr. **Davis**. No, sir; not in the sense of individual names. It is my understanding, and based on the conversations I had, that this is coordinated with the Department of Justice, Counsel for the President, but as far as specific names, I don't know who was involved.

Senator **Levin**. Well, I would hope in the future that when the Office of Government Ethics has a position on an ethical issue—that when it is told that its position cannot be made public and that its testimony is going to have to be changed before it is delivered to a congressional committee—that you would insist upon being heard on your position. I think that that is a minimal position for you.

I can understand why you are not going to deviate from the administration line publicly, but what I can't understand, frankly, is why you don't insist upon being heard inside the administration before they put a damper on your own position—before they gag you.

That is what I think you should be insistent on as the Office of Government Ethics. I know you are under some constraints and there is nothing perhaps there that is particularly surprising—that you are going to have to stick to the administration line—but it is somewhat surprising to me that when you submit testimony to the OMB saying one thing on a critical ethical issue here, involving a double standard and the public perception of whether or not Government officials are going to be bound by the same rules as a postal clerk, that when you are told, "sorry, that can't be your position," that you be more aggressive in saying, hey, wait a minute, I want to be heard on that issue.

That is my advice to you, for what it is worth.

Mr. **Martin**. Thank you.

Senator **Levin**. Thank you.

Senator **Cohen**. Could I inquire, the same question I asked before, if we were to recommend that this proposal be amended to provide only civil liability for any Federal official, any Government employee, would you be in support of that or against it?

In other words, we have no double standard. We say we are going to apply the same standard to everybody.

Mr. **Martin**. No, no. No, Senator, speaking for myself, I would prefer to see that warning on the 278 and on any form that we put out, the Office of Government Ethics puts out, that there is a penalty, a criminal penalty could be associated with it.

We would prefer not to use it. We would prefer to go to civilly in most instances. But I would like to see that there.

Senator **Cohen**. So you want to maintain uniformity at the criminal level, not just the civil level.

Senator Rudman.

Senator **Rudman**. Mr. Martin, your personal views, I guess, are what I am interested in because quite obviously your official views are not your own views.

How long have you been practicing law?

Mr. **Martin**. Practicing law?

Senator **Rudman**. Yes.

Mr. **Martin**. About 15 years.

Senator **Rudman**. You have worked on constitutional issues?

Mr. **Martin**. Yes, I have.

Senator **Rudman**. OK, then I expect you will understand the question I am about to ask you because I think there is a very hidden issue in this proposal.

Can you find, in your view as a lawyer of 15 years' experience with some constitutional law practice, any rational basis for a different standard between treating Members of Congress one way and everyone else another way in regard to false statements? Can you find any rational basis for that? Could you find any rational basis for that?

Mr. **Martin**. No, I can't.

Senator **Rudman**. Well, I can't either, and under U.S. Supreme Court cases on equal protection, if you cannot find a rational basis for discrimination and the class is not otherwise suspect, then the statute which authorizes the discrimination will be struck down.

So, Mr. Chairman, I think we might be in the truly anomalous situation here, where if we were to pass this law and the President were to sign it, that the first defendant who was not in the preferred class, and who challenges the constitutionality of the statute, will succeed in having section 1001 thrown out for everybody.

I mean, as far as I am concerned, Mr. Chairman, this statute fails on any equal protection argument, particularly on that one. I think anybody who knows anything about the Supreme Court cases dealing with equal protection would share that view, and I am just not sure that we want to do that unless we do it knowingly and willfully.

Mr. **Martin**. Well, I might add to what you have said, Senator—and, Senator Levin, I congratulate you on your perceptions of the need for maintaining public confidence—the Office of Government Ethics does not look at a criminal sanction like this only in terms of its criminal effects, but also as to the implications that are connected with the public confidence that goes with the trust and the reporting of the forms and maintaining the standards in the various executive branches. It is quite important to the Office of Government Ethics, and we view this as just one part of that aspect of the public confidence.

Senator COHEN. Well, to follow up on what Senator Rudman said, the basis of the equal protection clause is that persons who are similarly situated must be treated equally, and the only argument I heard from the prior witness was that lower Federal employees who are not members of the top level in the executive branch or Members of Congress are not similarly situated because they have to file more intrusive disclosure forms.

Is that a rational distinction in your mind?

Mr. MARTIN. No; it is not, and I might add, also, that there is a—we do a lot of public speaking and speaking before governmental groups, and one of the big complaints we get from career employees is that there is a double standard, and, out of no disrespect, they think a double standard applies to the executive branch versus the congressional branch and lesser to the senior officials versus the career officials; that is, the political appointees.

But I think if this law were to pass, they might see it even more so.

Senator COHEN. Now, I can't speak on behalf of Senator Hatch as I have not really had this discussion with him, but I suspect that there is probably some sentiment that the Justice Department engages in selective prosecution, that it has singled out Mr. Hansen for violations of the Ethics Act, but it did not go after Mrs. Ferraro, and that there may be some question about whether or not there has been selective prosecution under the act. As a result some Members would like to see us eliminate the discretion altogether. They may say that we are not going to give that kind of power to the Justice Department to go after Members of Congress they don't like and therefore we are just going to make it a civil penalty.

Now, I haven't had that discussion with anyone, but I suspect that there is some basis for that sentiment that Members continue to express.

Mr. MARTIN. That might be a part of it, but as I said earlier, the——

Senator COHEN. What is your response to that?.

Mr. MARTIN. Well, my response is this. As I said earlier, if we offer someone the opportunity to amend the form once they have been shown the error of their ways, I don't think it should be prosecuted criminally, and if that is the distinction that you can make with former Congressman Hansen, then I think it is appropriate to make.

Senator COHEN. Well, was that done with him?

Mr. MARTIN. I think he was shown the error, yes. He was asked to amend his forms, and I think he refused to.

Senator COHEN. Mr. Davis, you are chomping at the bit there.

Mr. DAVIS. Yes, Mr. Chairman. I wanted to add to that.

I think in applying the test that Justice articulated earlier, in our experience—and it has been limited— but, for instance, in the testimony Mr. Keeney footnotes the *Jaquish* case, the Senior Assistant Postmaster General that was prosecuted under this section.

In that particular case, being somewhat familiar with it, I think it is a good example of using this to complement the criminal conflicts of interest sections found under chapter 11.

For instance, in that situation there was a possibility of violations of both the 18 U.S.C. 208, in negotiating for employment or taking official acts that redound to your personal financial interests, and also violation of 207, the post-employment provisions, and therefore this was a useful tool to have available in that particular case, and I don't think you can argue selective prosecution. I think the situation there was this was another means arriving at a just resolution of a case where the other types of violations were involved.

Senator COHEN. Any other questions?

Thank you very much for testifying.

Our final witness this afternoon is Ann McBride, who is senior vice president of Common Cause. Ms. McBride has testified on a number of occasions before the subcommittee, reflecting Common Cause's longstanding concern about ethics issues.

I notice that you have a rather lengthy statement, and I would hope you would be able to summarize it, Ms. McBride.

TESTIMONY OF ANN McBRIDE, SENIOR VICE PRESIDENT, COMMON CAUSE

Ms. MCBRIDE. I would be pleased to summarize and hope that my statement can be included in its entirety in the record.[1]

Senator COHEN. It will be included in full in the record.

Ms. MCBRIDE. I really appreciate the opportunity to testify here today.

As Senator Levin mentioned earlier, the questions of ethics in Government have really been at the forefront of national attention in recent months.

In this atmosphere a number of Members of Congress have been speaking out, saying that they have grave concerns about what is going on. Some Members have proposed legislation strengthening ethics laws. Others have called for ethics laws to be vigorously enforced.

The legislation before you today does neither of these things. It is in fact a frontal assault on the ability to enforce ethics laws and would create a double standard, one for high Government officials and one for average citizens.

Mr. Chairman, this legislation should be strongly opposed at any time, but viewed in the context of the current growing national concern about ethical standards in Washington, it is a travesty.

Passage of this legislation at this time would be the worst possible signal that Congress could send to the country at a time of growing concern about ethical standards.

The legislation would not only weaken the enforcement of ethics laws, but it would thumb its nose at the American people, and what it would say is:

Members of Congress and other high Government officials are special. The same laws that apply to everyone else do not apply to us. It is a crime when you as an average citizen, file a false statement with the Government, but it is not a crime when I, as a high Government official, file a false financial disclosure.

It is just dead wrong to apply criminal sanctions for false statements generally—for example, a statement with the Internal Revenue Service—but to exempt from criminal sanctions Members of Congress and other high Government officials on their financial disclosure forms.

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[1] See p. 32 for Ms. McBride's prepared statement.

Mr. Chairman, I really was astonished at the Justice Department's testimony. I thought, after 20 years in Washington, I was past astonishment, but I really was astonished at the Justice Department today, coming in on a fundamental issue of the future application of criminal sanctions, and giving Congress a blank check to carve out a special exemption for themselves and for other high officials from a statute of general applicability.

I think the questions that went on here about who made these decisions are very important, and I think this subcommittee should know if Attorney General Meese was involved in this decision about treating public officials in a special way and whether Attorney General Meese agrees—knows and agrees with the nonposition of the Justice Department here today. I think it is absolutely essential that that be found out by this subcommittee.

Senator COHEN. If I could interrupt just for a moment.

I think what has happened—we are unlikely to find the answer to that question, but what has happened, in my estimation, is that the Justice Department will have a very tough case to carry when it comes before the subcommittee in the future and says that we have a judgment on a policy issue along these same lines, that we will be citing a precedent, saying you didn't have an opinion on an equally compelling matter and therefore we are not going to give it due regard.

That is the difficulty that has been created by this nonview on the part of the Justice Department.

Ms. MCBRIDE. I believe, Mr. Chairman, that the nonview also gives a blank check. The nonview says, fine with us, go ahead.

A nonview in this case has a very profound impact, in my opinion, in terms of the message that is given to Congress, the message that they simply have not given in the past.

As we know, the courts in Hansen have said that section 1001 applies to the Ethics in Government Act. That is what the courts are saying now, and it is the clear court ruling. Despite how anyone might choose to look at the legislative history, the court weighed the legislative history at both the district court level and in the court of appeals and concluded that section 1001 applies to the Ethics Act.

I think this really flies in the face of the proponents of this legislation who talk about this merely being a clarification of the intent of Congress. It is not simply a clarification. It would really be a major change in the current enforcement mechanisms available under existing law. It would profoundly weaken enforcement at a time when every branch of Government should be working for vigorous enforcement of ethics.

But most of all, Congress would be carving out for itself special exception to a law applicable to all other citizens and would be saying that Members of Congress and other high public officials are above the law when it comes to telling the truth to the Government in matters of ethics and financial disclosure.

In closing, I just want to say that we believe there is deep reason for concern in the country about growing ethics problems in Washington. The American people have a right to expect their public officials to act in the public interest and not for their own personal financial gain. The American people have a right to expect that those who lie to the Government will be subject to the same sanctions whether they are a Member of Congress, a Cabinet Secretary, or a private citizen.

The American people, Mr. Chairman, have a right to basic fairness, and I really hope that this subcommittee will flatly reject this legislation out of hand.

Thank you very much.

Senator COHEN. Thank you very much for your very brief and profound statements.

Senator Levin, do you have questions?

Senator LEVIN. Just one comment as to the decisionmaking process in the Department of Justice.

The testimony this afternoon from the Department of Justice was, as I remember it, that this decision went to the highest level of the Department of Justice and that there was some participation at least in it at that level. That is my understanding, my recollection of that testimony, and the record will perhaps bear me out or not.

But I think it is obvious from the testimony—that it did go to the highest level—that that must mean the Attorney General, unless the representative of the Justice Department was wrong this afternoon.

I don't think we ought to assume that. I think you are right in that regard, but that testimony, I believe, is an indication that the Attorney General himself had some participation in this decision. That is what I am assuming from that testimony. That is what I interpreted that testimony to mean.

I have no questions, Mr. Chairman.

Senator COHEN. Senator Rudman.

Senator RUDMAN. Ms. McBride, I would just make the general comment and observation, as chairman of the Senate Ethics Committee who personally is required to scrutinize in many instances filings done under these laws, that with all due respect to your statement about the increasing concern about ethics in Government, I want to tell you, as chairman of the Senate Ethics Committee, that not only do the Members of this body fill out those forms in exquisite, complete, laborious, exhaustive detail, but in addition to that, we have a number of inquiries every week from Members of the U.S. Senate who want to make sure that they are complying with particular provisions of the rules under which we operate.

Well, I can't speak for other branches or other parts of this Government, but as chairman of this Ethics Committee, I am very impressed with the reaction of our colleagues to the laws and the rules that we have.

Now, you may disagree with some of those rules. Common Cause, in many cases, has felt that the rules ought to be changed, and that is your right.

But to the extent that the rules currently apply, I want to make the general observation that I take this job very seriously as chairman of the Ethics Committee, as you might imagine, and I find extraordinary compliance with this law by Members of the U.S. Senate.

Senator COHEN. To that I would only add, unlike the Justice Department, the chairman of the Ethics Committee has never issued a statement of "no comment." [Laughter.]

Thank you very much.

Ms. McBRIDE. Thank you.

Senator COHEN. The subcommittee will stand adjourned.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JOHN C. KEENEY

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on S. 2214, a bill that would amend the enforcement provisions of the Ethics in Government Act (EIGA).[1/] EIGA provides for the disclosure by high level officials of the Executive branch, Members of Congress and Members of the Judiciary of their financial interests. Currently, violations of EIGA's disclosure requirements may be prosecuted as false statements under 18 U.S.C. §1001 and fines under the Criminal Fine Enforcement Act of 1984 may also be imposed.[2/] Thus, an individual violating EIGA may be subject to a $5,000 civil fine, which is a civil penalty under the EIGA itself, and, in addition, to five years imprisonment under 18 U.S.C. §1001 plus up to $250,000 in fines under the Criminal Fine Enforcement Act. S. 2214 would limit the penalty for EIGA infractions to a $5,000 civil fine while also making that limitation retroactive to "the date of enactment of the Ethics in Government Act."

We believe that the discretion to determine appropriate penalties for violation of federal law rests ultimately with the Congress, and we defer to your judgement in this case. However, we believe Congress has no authority to enact the retroactivity section of this bill and that, in addition, the retroactivity provision would be an unconstitutional intrusion on the

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[1/] P.L. 95-521; 92 Stat. 1824.

[2/] See 18 U.S.C. §3623.

President's constitutional power to pardon.

Originally signed into law on October 26, 1978, the EIGA provides, in title III, for full and complete disclosure of the financial activities of high level officials in all three branches of the federal governement. It does not regulate their conduct or prohibit their holding of any financial interest, but it does require disclosure, on certain forms, of such matters as outside income and of some types of loans made to these officials. The EIGA applies to a large number of career persons in high positions as well as to the President, Members of Congress, Members of the Judiciary and Cabinet officers. It extends, for example, to all Members of the Senior Executive Service and to Administrative Law Judges.

Since the EIGA was passed in 1978, the Justice Department has applied section 1001 to EIGA and the forms required by the EIGA carry specific warnings that section 1001 applies to intentionally false statements made on those forms. Nevertheless, it has been Department policy in EIGA cases to bring prosecutions under section 1001 only in aggravated cases where the false statements can be shown to have been deliberately designed to conceal improper or illegal conduct and thus can be shown beyond a reasonable doubt to have been made knowingly and willfully. Whenever this test has not been met, criminal prosecution has been declined. Consequently, indictments under section 1001 in cases involving EIGA forms have been authorized in only five cases in the last four years. [3/]

In our experience, the majority of high level public officials are scrupulously honest and would not for a minute consider falsifying their EIGA forms. Further, as was stated at the outset, whether false statements on EIGA forms should be removed from the scope of section 1001 and punished by a maximum civil penalty of $5,000 is a policy matter for Congress to decide.

However, the retroactivity provisions in sections 2, 3 and 4 of the bill can be read to nullify all criminal convictions under the Act since its passage in 1978. If this is the bill's intent, such action would be unprecedented. We strongly oppose the retroactivity provisions of S. 2214 on the grounds that Congress lacks the authority to enact a retroactivity provision which, as here, would unconstitutionally invade the President's exclusive power to pardon under Article II, Section 2, clause 1 of the Constitution. That clause states that the President has the

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[3/] Former Representative George Hansen, former Senior Assistant Postmaster General Paul E. Jaquish and former Deputy Director of the Science and Engineering Directorate at NASA, Herman E. Thomason, were convicted and/or pled guilty to making false statements on their EIGA forms. Former Assistant Secretary of the Navy George A. Sawyer and federal District Court Judge Harry E. Claiborne were acquitted of making such statements but Judge Claiborne was convicted on counts involving income tax evasion.

power to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." By contrast, the Constitution gives the Congress no authority to legislate a pardon for any particular individual or class of individuals. Chief Justice Marshall explained in 1833 that a pardon is "an act of grace, proceeding with the power entrusted with the execution of the laws ..." United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). Because the President's pardon power flows directly from the Constitution, it is not dependent on a legislative enactment, and cannot be infringed by Congress. See Schick v. Reed, 419 U.S. 256, 267 (1974); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1872).

There is some precedent for Congressional power in certain limited circumstances to effect the same result that would flow from an exercise of the President's pardon power. However, these circumstances are limited to those involving prospective grants of amnesty or immunity, or restoration of civil rights, to persons who have not yet been subjected to prosecution by the Executive.[4]

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[4] For example, in the post-Civil War period Congress enacted several pieces of legislation restoring civil rights to former rebels. Indeed, its power to take such action is specifically recongnized in the Fourteenth Amendment. See U.S. Const. Amend. XIV, sec. 3. In Brown v. Walker, 161 U.S. 593 (1896), the Supreme Court upheld a statute requiring witnesses subpoenaed in connection with Interstate Commerce Commission proceedings to testify in return for a grant of absolute immunity from any subsequent prosecution. See Burdick v. United States, 236 U.S. 79, 94 (1915), describing the "substantial" difference between "legislative immunity" and a presidential pardon.

Pg. 5

In no case we have found has Congress been held to have the power, through self-executing legislation, to grant relief in the form of remission of a prison sentence or monetary fine to individuals who have been convicted of violating a criminal statute.

We know of only one previous occasion on which Congress has considered legislation which might have had the effect of releasing convicted individuals. This was in S. 1145, a bill introduced in the 94th Congress, but not enacted, which would have provided amnesty to persons who failed to register for the draft, which included a provision directing the release from prison of persons convicted and serving a sentence for so failing to register. The Department testified in opposition to this legislation, taking the position that Congress has no power to effect release from prison, through legislation or otherwise, and that it may not encroach upon the President's power in this regard.

In sum, we defer to the Congress on the matter of the proper penalties to be assessed for knowingly and willfully false statements made on EIGA forms. However, insofar as S. 2214 would have the effect of voiding or modifying in any respect criminal penalties already imposed as a result of violations of the Ethics in Government Act, we believe it exceeds Congress' power to legislate, and would be an unconstitutional intrusion on the President's pardon power.

DOJ-1986-03

FOR RELEASE ON DELIVERY
Expected at 2:00 P.M. EST
June 25, 1986

STATEMENT OF

DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON
S. 2214

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate the invitation to appear before the Subcommittee to present the views of the Office of Government Ethics (OGE) on S. 2214, a bill proposing that civil penalties be the exclusive remedy for knowing and willful violations of the financial disclosure provisions of the Ethics in Government Act of 1978 (the Act).

Since passage of the Act, OGE has operated as though it had a variety of options available to ensure proper implementation of the public financial reporting provisions of the Act within the Executive branch. Included in those options were criminal sanctions and civil penalties, as well as a variety of administrative sanctions which could be imposed directly by the head of the agency concerned. Section 206 of the Act includes such steps as divestiture, requests for exemptions under 18 U.S.C. § 208(b), transfer, reassignment, limitation of duties or resignation.

Section 204 of title 5 Appendix, United States Code, containing provisions dealing with failure to file or falsifying information required to be reported by executive branch personnel, has been implemented by OGE regulations at 5 C.F.R. Part 734.701. In addition, the current instructions for completing the public financial disclosure report (SF 278), contains a statement that knowing or willful falsification of information required to be filed by section 202 of the Act may subject the filer to criminal prosecution under 18 U.S.C. § 1001. Whether such penalties should be assessed is a matter which we feel is best left to the discretion of Congress.

Our experience is that a failure to file public financial disclosure reports usually involves "termination reports." The provisions of section 201(c) of the Act require that such reports be filed on or before the thirtieth day after termination of federal employment. It seems that some individuals are reluctant to file once they terminate federal service. Generally, this reluctance to file is overcome by a letter from OGE or the parent agency pointing out the civil penalties for failure to file.

We have strong reservations on the effect of the retroactive provisions of S. 2214. Our current regulatory approach to public financial disclosure would certainly be disrupted if retroactive effect were given to the compliance provisions. Reliance on precedent, particularly when this reliance is based on court decisions and legislative history, is essential to an ethics program.

In summary, whether the criminal provisions of section 1001 of title 18, United States Code in egregious situations involving false filings should remain available to executive branch personnel is a decision which ultimately rests with Congress, and we defer to your judgment in this matter.

TESTIMONY OF ANN McBRIDE
SENIOR VICE PRESIDENT
COMMON CAUSE

on

S. 2214

before

THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

of the

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

June 25, 1986

Mr. Chairman, we appreciate very much the opportunity to testify here today. I am Senior Vice President of Common Cause, a citizens' organization of 250,000 members.

The question of ethics in government has been in the forefront of national attention in recent months. While the case of Michael Deaver has come to symbolize the serious problems of ethics in government, the Deaver affair is not an unusual or isolated case. Stories about officials abusing the public trust have become increasingly common. A recent Washington Post editorial has described the current environment in the nation's capital as "an age where former Cabinet officers rush to settle scores and make a mint with their memoirs, in which former top people from State and from Congress and from practically everywhere else become spectacularly well-paid consultants to foreign governments and in which sitting members of Congress daily exchange influence for vast sums of reelection money."

In this atmosphere, many Members of Congress have spoken out with concern about growing ethics problems in government. Some Members have introduced new legislation to strengthen ethics laws while others are calling for more vigorous enforcement of existing statutes.

But the legislation before this Subcommittee today does none of these things. It is, in fact, a frontal assault on the ability to enforce ethics laws and would create a double standard -- one for high government officials and one for average citizens. This legislation should be strongly opposed at any time, but viewed in the context of a current growing national concern about ethical standards in Washington, it is a travesty.

S. 2214 proposes to create a special exemption -- to exempt Members of Congress and other high public officials from criminal penalties that apply to all other Americans. Specifically, the bill exempts Members of Congress and other public officials from the criminal penalties of 18 U.S.C. § 1001 when filing false financial disclosure statements. We believe that such an exception for public officials is patently unfair and sets Members of Congress and other high-level officials apart as a special class of citizens under the law.

Section 1001 proscribes the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States. It is designed to prevent anyone who files information with the government from intentionally lying to the government. As the Court of Appeals for the D.C. Circuit stated recently: "Section 1001 is a statute of general applicability, designed to protect a 'myriad [of] governmental activities.'" United States v. Hansen, 772 F.2d 940 (1985), cert. denied, 54 U.S.L.W. 3582 (U.S. Mar. 3, 1986) (No. 85-973) (quoting United States v. Rogers, 466 U.S. 475 (1984)). S. 2214 would carve out a special and unwarranted exception from this provision of "general applicability."

We believe that Members of Congress and other high public officials should be held to the same standard to which other citizens are held with regard to filing of false statements. It is unacceptable from a policy standpoint to apply criminal sanctions for false statements generally (for example, a false tax statement to the Internal Revenue Service) but to exempt from criminal sanctions the false statements of Members of Congress and other high government officials on their financial disclosure forms.

Not only is there no evident reason to make public officials exempt from the scope of § 1001, there are strong reasons for continuing to apply § 1001 to the Ethics in Government Act. Financial disclosure is a cornerstone of the Act, which has as its legislative purpose the preservation and promotion of public confidence in the integrity of Federal officials. There is absolutely no rationale or justification for exempting Members of Congress and other high-level public officials from a general provision designed to encourage compliance and prevent knowing deception in _any_ situation where information is required to be filed with the government.

Common Cause strongly opposes S. 2214 and urges this Subcommittee and Congress to flatly reject it.

This Subcommittee has asked for our views on three specific issues with regard to S. 2214: First, the current application of 18 U.S.C. § 1001 to false financial statements filed under the Ethics in Government Act; second, the retroactivity provisions of S. 2214; and third, the impact of the bill on public perceptions of the integrity of high-ranking government officials.

The Applicability of 18 U.S.C. § 1001 to the Ethics in Government Act (EIGA)

The question of the applicability of 18 U.S.C. § 1001 to the filing of false statements under the financial disclosure provisions of the Ethics in Government Act has been at the center of United States v. Hansen, a well-known case involving former Idaho Congressman George Hansen. In an opinion written for the United States Court of Appeals, District of Columbia Circuit, by Judge Antonin Scalia (recently nominated by President Reagan to the Supreme Court), the court made clear that § 1001 applies to the Ethics Act and rejected Hansen's argument that "'Congress prescribed only a civil remedy and did not authorize criminal punishment for the submission of a false EIGA statement.'" Hansen at 944 (quoting Brief for Appellant at 27). The court determined that the legislative history of the Act does not establish by the required "clear and manifest" evidence that Members of Congress believed § 1001 would not apply by its terms to an Ethics in Government Act violation. The court therefore concluded that § 1001 covers falsification of Ethics in Government Act financial disclosure forms.

The Court further pointed out that Representative Hansen was warned of the applicability of criminal penalties "with a specificity that a prospective lawbreaker rarely enjoys. The forms that Hansen signed all contained a warning, immediately above or below the signature line, that 'any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. § 706 and 18 U.S.C. § 1001.'"

In Hansen, the Court also rejected the argument that 2 U.S.C. § 706 displaced § 1001. The court stated that federal statutes, 18 U.S.C.A. § 1001 and 2 U.S.C. § 706, "combine to produce a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of § 706, while those who lie on their reports are additionally subject to criminal penalties of § 1001." Hansen at 945. This incremental approach to the severity of sanctions, in our view, is appropriate and desirable and necessary for the Ethics Act to function properly.

The effort to exempt Members of Congress and other high public officials from the application of 18 U.S.C. § 1001 would be a fundamental change in the current enforcement mechanisms available under existing law, would be a major step backward in the application of ethics standards and would profoundly weaken enforcement at a time when vigorous enforcement of ethics laws should be a priority for all branches of government. But most of all, Congress would be carving out for itself a special exception to a law applicable to all other citizens and would be saying that Members of Congress and other high-level public officials are above the law when it comes to telling the truth to the government in matters of ethics and financial disclosure.

S. 2214 should be flatly rejected.

Retroactivity Provisions

According to S. 2214, the removal of criminal penalties is "deemed to be effective on the date of the enactment of the Ethics in Government Act." In other words, the removal of criminal penalties would be retroactive to 1978.

Common Cause strongly opposes S. 2214 whether it is prospective or retroactive. However, the retroactive nature of S. 2214 makes it even more insidious.

According to a recent article in the Washington Post, after the court rejected Representative Hansen's plea for probation, "Hansen is placing high hopes in a bill, introduced by Senator Orrin G. Hatch (R-Utah), that states that civil penalties are the only penalties to be applied for violations of the financial disclosure requirements of the Ethics in Government Act ... Hansen's attorney, [Nathan] Lewin, said yesterday that passage of the bill would make the Hansen prosecution 'moot' and the criminal case would be 'wiped off the books.'"

This would be a disastrous result if -- in one of the rare convictions under ethics statutes -- Congress then were to wipe the conviction off the books, rendering the prosecution "moot".

Impact of S. 2214 on Integrity of High-Ranking Officials

Mr. Chairman, we believe that there is deep reason for concern in the country about the growing ethics problems in Washington. The American people have a right to expect their public officials to act in the public interest and not for their own personal financial gain. The American people have a right to expect that those who lie to the government will be subject to the same sanctions whether they are a Member of Congress, a Cabinet Secretary, or an average taxpayer. The American people have a right to expect basic fairness.

Nothing is so damaging to our democracy as the loss of integrity in government. We are at a crisis point today, I believe, faced with a question of whether public service continues to be a public trust. It is incumbent on Congress to strengthen ethics laws and to work to ensure that existing statutes are vigorously enforced.

S. 2214 goes in the exact opposite direction. While profoundly weakening the enforcement of ethics laws, it also thumbs its nose at the American people and says, "Members of Congress and other high public officials are special; the same laws that apply to everyone else do not apply to us. It's a crime when you, as an average citizen, file a false statement to the government but it's not a crime when I, as a high government official, file a false financial disclosure."

Mr. Chairman, the impact of this bill on public perceptions of the integrity of government and high-ranking government officials would be disastrous. We strongly urge this Subcommittee to flatly reject S. 2214 and send a strong, clear message that the Congress stands for equal application of the law.

II

99TH CONGRESS
2D SESSION

S. 2214

To clarify that a civil penalty is the exclusive penalty for violations of the Ethics in Government Act.

IN THE SENATE OF THE UNITED STATES

MARCH 20 (legislative day, MARCH 18), 1986

Mr. HATCH (for himself and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To clarify that a civil penalty is the exclusive penalty for violations of the Ethics in Government Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 2. Section 706 of title 2, United States Code, is amended by inserting after the words "not to exceed $5,000." and before the words "No action" the following: "This civil penalty shall be the exclusive penalty for such knowing and willful violation of section 702 of this title, notwithstanding any other provision of the United States Code, including section 1001 of title 18. This section shall be deemed to be effective on the date of enactment of the Ethics in Government Act.".

SEC. 3. Section 304 of title 28 appendix, United States Code, is amended by inserting after the words "not to exceed $5,000." the following: "This civil penalty shall be the exclusive penalty for such knowing and willful violation of section 302 of this title, notwithstanding any other provision of the United States Code, including section 1001 of title 18. This section shall be deemed to be effective on the date of enactment of the Ethics in Government Act.".

SEC. 4. Section 204 of title 5 appendix, United States Code, is amended by inserting after the words "not to exceed $5,000." the following: "This civil penalty shall be the exclusive penalty for such knowing and willful violation of section 202 of this title, notwithstanding any other provision of the United States Code, including section 1001 of title 18. This section shall be deemed to be effective on the date of enactment of the Ethics in Government Act.".

Section 706, Title 2, United States Code

§ 706. Failure to file or filing false reports

The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000. No action may be brought under this section against any individual with respect to a report filed by such individual in calendar year 1978 pursuant to section 701(d) of this title.

Section 304, Title 28 Appendix, United States Code

§ 304. Failure to file or falsifying reports

(a) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully falsifies or who knowingly or willfully fails to file or report any information that such individual is required to report pursuant to section 302. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

(b) The Committee shall refer to the Attorney General the name of any individual the Committee has reasonable cause to believe has willfully failed to file a report or has willfully falsified or failed to file information required to be reported.

Notes of Decisions

Injunction 3
Jurisdiction 2
Parties 1

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1. Parties

In view of fact that action was not suit for money damages but was suit to have Act of Congress, this chapter, declared unconstitutional and its enforcement enjoined, judgment would not be prejudicial to Judicial Ethics Committee or its chairman, provided for under this chapter, and court could render adequate relief to parties before it, so that such Committee and its chairman were not indispensable parties requiring dismissal of suit for failure to obtain personal jurisdiction over them. Duplantier v. U.S., C.A.La.1979, 606 F.2d 654, rehearing denied 608 F.2d 1373, certiorari denied 101 S.Ct. 854, 449 U.S. 1076, 66 L.Ed.2d 798.

2. Jurisdiction

Duties of Judicial Ethics Committee and its chairman under this chapter did not amount to such contact with Louisiana as to confer personal jurisdiction over committee and its chairman under Louisiana Long-arm Statute, LSA-R.S. 13:3201 in view of fact that chairman and its Committee had not transacted any business in Louisiana nor did they regularly engage in any other persistent course of conduct within the state. Duplantier v. U.S., C.A.La.1979, 606 F.2d 654, rehearing denied 608 F.2d 1373, certiorari denied 101 S.Ct. 854, 449 U.S. 1076, 66 L.Ed.2d 798.

3. Injunction

Where district court did not have jurisdiction to enter in personam injunction against Judicial Ethics Committee and its chairman but did have jurisdiction to test constitutionality of this chapter in suit against United States and Attorney General, Court of Appeals, in view of great public importance of this chapter and in view of interest of judicial economy, would pass upon merits of plaintiffs' motion for preliminary injunction against enforcement of this chapter, based on asserted unconstitutionality of this chapter. Duplantier v. U.S., C.A.La.1979, 606 F.2d 654, rehearing denied 608 F.2d 1373, certiorari denied 101 S.Ct. 854, 449 U.S. 1076, 66 L.Ed.2d 798.

Section 204, Title 5 Appendix, United States Code

§ 204. Failure to file or filing false reports

(a) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully falsifies or who knowingly or willfully fails to file or report any information that such individual is required to report pursuant to section 202. The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed $5,000.

(b) The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as the case may be, shall refer to the Attorney General the name of any individual he has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.

(c) The President, the Vice President, the Secretary concerned, the head of each agency, and the Office of Personnel Management, may take any appropriate personnel or other action in accordance with applicable law or regulation against any individual failing to file a report or falsifying or failing to report information required to be reported.

Legislative History. For legislative history and purpose of Pub.L. 95-521, see 1978 U.S. Code Cong. and Adm. News, p. 4216. See, also, Pub.L. 96-19, 1979 U.S. Code Cong. and Adm. News, p. 144.

Section 1001, Title 18, United States Code

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

Statement of Senator Orrin G. Hatch Regarding S. 2214 before the Committee on Governmental Affairs Subcommittee on Oversight of Government Management

I want to thank Senator Cohen and his staff for arranging this hearing and for inviting me to testify. I applaud Senator Cohen and the other members of this Subcommittee for their vigilant work in overseeing government management.

Together with Senator Cranston, I am the primary sponsor of S. 2214, the bill we are here to discuss. The bill is simple in purpose and affect. It clarifies the original intent of Congress to impose civil -- and not criminal -- penalties for violations of the Ethics in Government Act.

The Ethics Act was passed in 1978 after both houses of Congress had given the subject a great deal of time and attention. Many saw the Act's financial disclosure filings as undue intrusions into the private lives of Members of Congress and the other government employees to whom the Act applies. Others felt the disclosure requirements were necessary to provide voters and the public at large with a clearer picture of government officials' personal contacts and financial dealings.

Included in the overall debate was the question whether the new paperwork burdens should subject the violator to civil fines or criminal sanctions, or both. It was widely recognized that failure to disclose pertinent financial information would upon discovery bring about a variety of practical consequences, including loss of public confidence and possible subsequent defeat at the polls, but there eventually emerged a consensus of opinion that disclosure violations should not also subject the violator to criminal liability. There were already on the books criminal laws covering bribery and fraud and conflicts of interest which would be used to prevent and prosecute truly egregious conduct.

The House of Representatives specifically deleted any criminal penalties from the Ethics Act and adopted a provision subjecting violators to no more than a civil fine of $5,000.00. This deletion of criminal sanctions is referred to in numerous statements during debate of the Ethics Act on the House floor. For example, Representative Bauman summarized the subject for his colleagues as follows: "Under the full disclosure provision which this bill makes, a substantial civil penalty is provided. It would have been a criminal penalty, but it was changed to get the bill through the House."

Accordingly, when the Senate and House versions of the Ethics Act came out of conference, all criminal penalites had been deleted.

After passage of the Ethics Act, however, federal prosecutors have attempted to impose criminal sanctions on certain persons for alleged violations of the Act. The Justice Department recognizes that the Ethics Act itself calls for only a civil penalty, but federal prosecutors have attempted to get around that hurdle by instituting criminal proceedings under the general fraud statute found at 18 U.S.C. Section 1001. By so doing, the federal prosecutors have circumvented congressional intent. On at least 2 occasions to date, criminal convictions have been obtained against public officials for allegedly failing to declare pertinent financial information on disclosure forms, without any accompanying charge of bribery, conflict of interest, fraud, deceit, or any other criminal wrongdoing of any kind. Other cases have been unsuccessfully brought, such as a recent action in federal court in Los Angeles against former assistant Navy secretary George A. Sawyer for allegedly making false statements on his financial disclosure forms by failing to disclose $833.00 in travel expenses paid by a St. Louis company with whom he had been interviewing for possible employment.

The case against former Idaho Congressman George Hansen is especially disturbing. Representative Hansen was charged criminally with several counts of failing to disclose certain transactions carried out entirely by his wife and in her name. No fraud or bribery claim of any kind was made, yet Mr. Hansen was convicted for nothing more than his failure to disclose, and he is now serving time in a federal jail. It is also significant to note that Mr. Hansen was defeated for re-election by less than 100 votes, a defeat no doubt spawned by the criminal charges themselves.

We in this body are all subject to the Ethics Act and I am confident that we all seek to faithfully comply with the Act's terms and provisions. If the information we thereby disseminate results in our being defeated at the polls or in some other disapproval by our constituencies, that is one thing, but the paperwork requirements themselves should not carry criminal penalties and thereby grant Justice Department attorneys an additional source of power against those subject to the terms of the Act. To give the prosecutors that kind of leverage would be unwise and possibly very dangerous. There are already specific provisions of the United States Code upon which federal prosecutors may seek criminal indictments for bribery or related offenses. They do not need this further prosecutorial tool which was never intended to be created in the first place.

Ever since this great constitutional form of government of ours was created, we in the Congress of the United States have been proud of our ability to responsibly take care of our own affairs. We should not so neglectfully send that responsibility to the executive and judicial branches, where political decisions to prosecute and convict will by their very nature be forever present. The doctrine of separation of powers should not be so callously ignored. The lines between the legislative and executive and judicial branches have been blurred enough in recent times. We should not blur them further by giving federal prosecutors carte blanche to bring criminal cases against anyone who may not have filled out his or her financial disclosure form exactly right.

This bill has also been introduced in the House of Representatives, where it has widespread support among the leadership and both political parties. Perhaps due to the close association of the House with recent cases involving this issue, such as the Hansen case, and the frequent mention in the press of the possibility of a similar action against former Representative Geraldine Ferraro, the House is more attuned than we are to the serious ramifications of the Ethics Act's sanctions as they are presently being misinterpreted by the federal courts.

This bill seeks to clearly state the law of penalties associated with the Ethics Act as it was originally intended. With good reason, the Act was never intended to create criminal liability. The simple language of this bill will make clear that it does not.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,

VS.

GEORGE VERNON HANSEN,

DEFENDANT

- - - - - - - - - - - - - - - - - x

CRIMINAL ACTION
NO. 83-75

WASHINGTON, D. C.

MONDAY, JUNE 16, 1986

THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING ON MOTION OF DEFENDANT TO REDUCE SENTENCE, AND EXECUTION OF SENTENCE, BEFORE THE HONORABLE JOYCE HENS GREEN, UNITED STATES DISTRICT JUDGE, AT 10:45 A.M.

APPEARANCES:

FOR THE GOVERNMENT:

REID WEINGARTEN, AUSA, DEPARTMENT OF JUSTICE
JAMES COLE, AUSA, DEPARTMENT OF JUSTICE

FOR THE DEFENDANT:

NATHAN LEWIN, ESQ.
STEPHEN BRAGA, ESQ.
FRANK A. S. CAMPBELL, ESQ.

FOR THE PROBATION OFFICE:

GREGORY HUNT

OFFICIAL COURT REPORTER - GORDON A. SLODYSKO, (202) 535-3404

PROCEEDINGS

(DEFENDANT PRESENT)

THE DEPUTY CLERK: CRIMINAL ACTION 83-75, UNITED STATES OF AMERICA VERSUS GEORGE VERNON HANSEN. MR. WEINGARTEN AND MR. COLE FOR THE GOVERNMENT; MR. LEWIN, MR. BRAGA, MR. CAMPBELL FOR THE DEFENDANT; AND MR. HUNT FOR THE PROBATION OFFICE.

THE COURT: YES. WE ARE HERE BEFORE THE COURT FOR THE PURPOSE OF THE SENTENCING OF MR. HANSEN, AND, PRELIMINARILY TO THAT, FOR ARGUMENT AND RULING ON HIS MOTION FOR REDUCTION OF SENTENCE AND THE GOVERNMENT'S OPPOSITION THERETO. AND I THINK IT MUST HAVE BEEN APPARENT TO THE COUNSEL THAT SINCE ALL PARTIES HAVE A RIGHT, UNDER LAW, TO ADDRESS THE COURT AT THE TIME OF SENTENCING, THAT IT WOULD BE MORE EXPEDITIOUS AND PRUDENT TO DO THIS ALL OF ONE PIECE AND HEAR THE ARGUMENT AT THIS TIME, MAKE A DETERMINATION, AND THEN IMPOSE SENTENCE.

SO, MR. LEWIN, IT IS YOUR MOTION, SIR. THE GOVERNMENT WILL THEN OPPOSE IT, I PRESUME. AND THEN, OF COURSE, YOU MAY HAVE THE FINAL WORD IN THAT REGARD. I WOULD ASK THAT AS YOU ARE DOING IT, YOU MAKE WHATEVER REMARKS YOU WOULD HAVE MADE IN ELOCUTION TO THE SENTENCE, SO THAT WE HAVE YOU UP HERE AT ONE TIME. AND THEN, OF COURSE, I WILL HEAR FROM MR. HANSEN FOLLOWING THAT.

MR. LEWIN: YES, YOUR HONOR.

THE COURT: GOOD MORNING.

MR. LEWIN: GOOD MORNING. THANK YOU, YOUR HONOR.

WE ARE HERE, AS YOUR HONOR HAS INDICATED, FOR ARGUMENT ON OUR MOTION FOR REDUCTION OF SENTENCE, YOUR HONOR HAVING DECIDED THE QUESTIONS OF A NEW TRIAL AND REQUESTS FOR FURTHER DISCOVERY.

WITH REGARD TO THE MOTION FOR REDUCTION OF SENTENCE, IT IS CLEAR, WE SUBMIT, THAT THE FEDERAL RULE PROVIDES FOR THAT MOTION PRECISELY TO GIVE THE COURT THE KIND OF OPPORTUNITY THAT IT HAS TODAY, TO LOOK AT THE EVENTS THAT HAVE TRANSPIRED SINCE THE TIME OF INITIAL IMPOSITION OF SENTENCE AND TO CONSIDER WHETHER IN LIGHT OF THOSE CIRCUMSTANCES IT CONTINUES TO BE APPROPRIATE TO IMPOSE THE SENTENCE WHICH THE COURT HAS ANNOUNCED AT THE TIME INITIALLY SET FOLLOWING THE TRIAL. AND IT IS OUR POSITION, FOR THE REASONS THAT WE'VE SET OUT IN THE MEMORANDUM, AND I WILL JUST BRIEFLY TOUCH ON THE HIGHLIGHTS HERE, THAT THERE HAS BEEN SUCH A VERY SUBSTANTIAL CHANGE IN TERMS OF THE CONDITIONS AS THEY AFFECT THIS DEFENDANT THAT IT REALLY IS NO LONGER JUST; THAT ENTIRELY APART FROM THE MERITS OF THE CRIMINAL CHARGE AND THE OFFENSE OF WHICH THE DEFENDANT WAS CONVICTED, THAT IT NO LONGER IS JUST, IN VIEW OF THE INTERVENING CIRCUMSTANCES, TO PROVIDE THE KIND OF SENTENCE THAT YOUR HONOR DID IMPOSE, A TERM OF IMPRISONMENT OF 5 TO 15 MONTHS AND A TOTAL FINE OF $40,000, AND THAT THESE INTERVENING EVENTS WARRANT RECONSIDERATION OF THAT SENTENCE IN VIEW OF TODAY'S CONDITION.

WE NOTED IN OUR MEMORANDUM INITIALLY THE LANGUAGE OF A STATUTE THAT CONGRESS ENACTED SUBSEQUENT TO YOUR HONOR'S

IMPOSITION OF SENTENCE, AND I WON'T REPEAT THE LANGUAGE OF THAT STATUTE, BUT IT IS CLEAR FROM CONGRESS' PURPOSE IN ENACTING SENTENCING REFORM THAT COURTS IN THE KINDS OF SITUATIONS INVOLVING NONVIOLENT, NONSERIOUS OFFENDERS, WHERE THE INTERESTS OF THE SOCIETY AS A WHOLE CAN CONTINUE TO BE SERVED THROUGH THE IMPOSITION OF ALTERNATIVE SENTENCES, THAT COURTS -- CONGRESS HAS ADVISED COURTS THAT THEY SHOULD, IN DETERMINING THE PARTICULAR SENTENCE TO BE IMPOSED, USE MEANS OTHER THAN THOSE WHICH WOULD CAST A BURDEN UPON THE PRISON SYSTEM. AND CONSEQUENTLY, AS I SAY, THAT'S A NEW POLICY; THAT'S A POLICY THAT COULD NOT BE BROUGHT TO THE COURT'S ATTENTION PRIOR TO SENTENCING THAT WE HAVE BROUGHT TO THE COURT'S ATTENTION TODAY, THAT IT IS CONGRESS' DESIRE THAT COURTS INVOKE AND UTILIZE, AND THAT WE ASK THE COURT TO TAKE INTO ACCOUNT HERE.

NOW, IF THAT WERE ALL, QUITE FRANKLY, I WOULD SAY, WELL, CERTAINLY THIS IS IN SOME WAYS AN UNUSUAL CASE, AND MAYBE YOUR HONOR, EVEN IN LIGHT OF THAT ONE STATEMENT OF CONGRESSIONAL POLICY, MIGHT DECIDE THAT THIS IS AN APPROPRIATE CASE TO DO OTHERWISE. HOWEVER, THERE ARE A NUMBER OF OTHER CIRCUMSTANCES WHICH I THINK ARE VERY TELLING WITH REGARD TO THE PRESENT SITUATION AND THE APPROPRIATENESS OF PUNISHMENT OF IMPRISONMENT WHICH YOUR HONOR INITIALLY IMPOSED.

FIRST OF ALL, CERTAINLY WITH REGARD TO THE PUNISHMENT OF IMPRISONMENT, I'M SURE THAT YOUR HONOR'S CONSIDERATION IN IMPOSING THAT PUNISHMENT WAS AS A MATTER OF GENERAL DETERRENCE;

TO ADVISE THE PUBLIC AT LARGE AND OTHER PEOPLE WHO ARE IN THE SAME SITUATION AS THE DEFENDANT THAT THE KIND OF OFFENSE WITH WHICH HE WAS CHARGED AND CONVICTED COULD NOT BE COMMITTED WITHOUT A SUBSTANTIAL FORM OF RETRIBUTION OR PUNISHMENT. AND AT THE TIME THAT SENTENCE WAS IMPOSED, GIVEN THE CIRCUMSTANCES AS OF THAT DATE, THAT MAY VERY WELL HAVE BEEN APPROPRIATE. AT THAT POINT, YOUR HONOR WILL RECALL, MR. HANSEN WAS A SITTING CONGRESSMAN; THERE WAS AN ELECTION THAT WAS GOING TO BE COMING UP; THERE WAS NO WAY OF KNOWING WHETHER HE WOULD OR WOULD NOT PREVAIL IN THAT ELECTION. THERE WAS NO WAY OF KNOWING WHETHER THE CONGRESS ITSELF WOULD TAKE ANY ACTION WITH REGARD TO WHAT THIS COURT'S RECORD HAD SHOWN. AND IN THOSE CIRCUMSTANCES, THE COURT SAID A TERM OF IMPRISONMENT OF 5 TO 15 MONTHS WOULD BE APPROPRIATE.

SINCE THAT TIME, THERE HAS BEEN VERY, VERY SUBSTANTIAL PUNISHMENT IMPOSED UPON THIS DEFENDANT BY THESE OTHER MATTERS THAT WERE MERELY WAITING IN THE WINGS AT THAT TIME. SPECIFICALLY, THE HOUSE, MOTIVATED PRECISELY, THE RECORD SHOWS, BY THIS CONVICTION — HAD IT NOT BEEN FOR THE CONVICTION, I THINK IT IS PLAIN THERE WOULD NOT HAVE BEEN ANY HOUSE PROCEEDING, BECAUSE THE HOUSE INVOKED THE HOUSE RULE WHICH REQUIRED THAT PROCEEDING IN LIGHT OF THE CONVICTION. THE HOUSE PROCEEDED WITH A PROCEEDING WHICH WAS CONDUCTED PUBLICLY, WHICH RESULTED IN A REPRIMAND OF THE DEFENDANT, WHICH WAS PUBLICLY BROADCAST, WHICH PROVIDED SUBSTANTIAL GRIST FOR THE NEWS MILL, AND WHICH IN FACT, SO FAR AS HE WAS CONCERNED, CERTAINLY AFFECTED HIM VERY SERIOUSLY PERSONALLY AND IN HIS PROFESSIONAL LIFE.

BUT THAT WASN'T ALL. FOLLOWING THAT, THE ELECTION TOOK PLACE IN HIS CONGRESSIONAL DISTRICT IN IDAHO. AND IT WAS, YOUR HONOR — NOBODY CAN DENY IT WAS A VERY, VERY CLOSE RESULT. AND THE RESULT WAS THAT THE VOTERS IN HIS CONGRESSIONAL DISTRICT VOTED AGAINST HIM. AND I DON'T THINK IT CAN REALLY BE GAINSAID THAT IT WAS THE CONVICTION THAT PRODUCED THAT RESULT. IT WAS THE FACT THAT HE HAD BEEN CRIMINALLY CONVICTED IN THIS COURT AND THAT HE HAD BEEN FOUND GUILTY OF OFFENSES UNDER 18 U.S.C., SECTION 1001, THAT IN FACT TURNED HIM OUT OF CONGRESS AND DEPRIVED HIM OF WHAT HAD BEEN HIS LIVELIHOOD FOR MANY YEARS PRIOR TO THAT TIME.

AND THAT REACHES ANOTHER VERY IMPORTANT POINT IN TERMS OF A PERSONAL EFFECT ON THE DEFENDANT. THERE ARE MANY CASES, AS YOUR HONOR KNOWS, WHERE PEOPLE MIGHT BE INVOLVED IN CRIMINAL OFFENSES, BUT THEY ARE ENGAGED IN PROFESSIONS OR IN ACTIVITIES WHICH, EVEN SUBSEQUENT TO THE CRIMINAL ACTIVITY, THEY ARE ABLE TO CONTINUE. CONGRESSMAN HANSEN WAS A CONGRESSMAN, AND HE HAS BEEN DENIED — HE HAS BEEN EFFECTIVELY EXCLUDED FROM HIS POLITICAL CAREER, WHICH WAS WHAT HIS LIVELIHOOD WAS AT THAT CRITICAL POINT OF HIS LIFE, AS A RESULT OF THE CONVICTION. SO THE PUNISHMENT HAS BEEN VERY SEVERE. THERE IS NO POSSIBILITY THAT ANYBODY COULD POSSIBLY THINK THAT HE OR SHE COULD BLITHELY

IGNORE THE PROVISIONS OF THE ETHICS IN GOVERNMENT ACT OR 18 U.S.C. 1001 IF ONE LOOKS AT THE HISTORY OF WHAT HAPPENED TO GEORGE HANSEN FOLLOWING HIS CONVICTION — FOLLOWING HIS CONVICTION IN THIS COURT, AND, I SUBMIT, AS A DIRECT RESULT OF THAT CONVICTION.

NOW, THAT BRINGS ME, THEN, TO THE OTHER SIDE OF THE COIN WHICH I THINK IS VERY RELEVANT AS TO THINGS THAT HAVE HAPPENED SINCE THEN. I THINK IT IS APPROPRIATE FOR YOUR HONOR TO CONSIDER THE APPEARANCE OF EVENHANDEDNESS AS IT IS VIEWED BY THE PUBLIC AS A RESULT OF WHAT HAPPENS IN THIS CASE AND WHAT MAY HAVE HAPPENED IN SUBSEQUENT SIMILAR SITUATIONS. THE PRESS HAS BEEN — AND THE MEDIA HAVE CERTAINLY HAD MANY, MANY ACCOUNTS OF VERY WELL-KNOWN PUBLIC PERSONALITIES, BEGINNING WITH THE PRESENT ATTORNEY GENERAL. AND YOUR HONOR IS AWARE THAT THAT INVESTIGATION WAS BEGUN JUST ABOUT THE TIME OF THIS TRIAL AND WAS A SUBJECT OF SUBSTANTIAL DISCUSSION HERE IN THIS COURTROOM BECAUSE OF THE VERY SUBSTANTIAL PUBLICITY THAT BEGAN AT THE TIME THAT THIS TRIAL BEGAN.

NOW, THE INVESTIGATION OF THE PRESENT ATTORNEY GENERAL TURNED UP, I THINK BY ALL ACCOUNTS, MR. STEIN'S REPORT, THAT THERE WERE TECHNICAL OR MORE THAN TECHNICAL VIOLATIONS OF THE ETHICS IN GOVERNMENT ACT INSOFAR AS WHAT THE ATTORNEY GENERAL DID. HOWEVER, MR. STEIN SAID IN HIS REPORT, IN DECLINING TO PROSECUTE MR. MEESE, THAT HE HAD CONSULTED WITH THE DEPARTMENT OF JUSTICE AND THAT THE DEPARTMENT OF JUSTICE — NOT HE, BUT THE

DEPARTMENT OF JUSTICE HAD INFORMALLY ADOPTED AN INTERNAL POLICY RESPECTING THE USE OF SECTION 1001 TO PROSECUTE FALSE FILINGS OF FINANCIAL DISCLOSURE STATEMENTS. THIS POLICY IN GENERAL DISFAVORS SUCH PROSECUTIONS EXCEPT IN THE MOST EGREGIOUS CASES, SUCH AS WHERE THE FALSE FILING IS CONNECTED WITH AN EFFORT TO CONCEAL OR COVER UP SIGNIFICANT UNDERLYING CONDUCT THAT IS CLEARLY IMPROPER, ILLEGAL OR CRIMINAL. NOW, MR. STEIN ON THAT BASIS SAID, ALTHOUGH THERE WERE VIOLATIONS OF THE ETHICS IN GOVERNMENT ACT, HE WOULD NOT PROSECUTE BECAUSE THAT'S THE DEPARTMENT OF JUSTICE POLICY.

WE SUBMIT THAT TAKING A DISPASSIONATE VIEW OF THE RECORD IN THIS CASE, THERE WAS NO BRIBERY, THERE WAS NO UNDERLYING ILLEGAL CONDUCT. THERE WERE, THIS RECORD SHOWS, SITUATIONS IN WHICH INDIVIDUALS HAD PROVIDED ASSISTANCE TO MRS. HANSEN OR TO CONGRESSMAN HANSEN, IN THE PROSECUTION'S VIEW. BUT ALL THE EFFORTS TO PROVE A BRIBE, I THINK THE GOVERNMENT ADMITTED, WITH REGARD TO NELSON BUNKER HUNT, WERE CLEARLY UNSUBSTANTIATED. THERE WAS NO BASIS FOR BELIEVING THERE WAS ANY UNDERLYING OFFENSE. CONSEQUENTLY, IN VIEW OF THIS SUBSEQUENT DISCLOSURE, THIS IS AGAIN A THING THAT HAPPENED SUBSEQUENT TO THE SENTENCE IN THIS CASE, THE DISCLOSURE OF THE DEPARTMENT OF JUSTICE POLICY THAT THEY WOULD NOT PROSECUTE EXCEPT IN CASES WHERE THERE IS UNDERLYING ILLEGALITY.

SO, ONE HAS THE CASE OF ATTORNEY GENERAL MEESE, AND THEN, OF COURSE, ONE HAS THE CASE OF THE DEMOCRATIC VICE

PRESIDENTIAL NOMINEE, REPRESENTATIVE FERRARO. AND IN HER CASE AS WELL, THERE WAS, I THINK, PLAINLY FROM THE RECORD THAT WAS MADE BOTH IN THE PUBLIC MEDIA, THE RECORD THAT WAS MADE IN TERMS OF CONGRESSIONAL INVESTIGATION OF THIS — THERE WERE VIOLATIONS, TECHNICAL OR OTHERWISE, OF THE ETHICS IN GOVERNMENT ACT WHICH THE DEPARTMENT OF JUSTICE DETERMINED NOT TO PROSECUTE. AND THERE IS THE CASE OF REPRESENTATIVE DANIEL, WHICH WE HAVE ALSO OUTLINED IN OUR MEMORANDUM.

THE SHORT OF THE MATTER IS, YOUR HONOR, THAT IF CONGRESSMAN HANSEN IS SENT TO JAIL ON THIS OFFENSE, HE WILL BE THE ONLY PERSON, LITERALLY THE ONLY PERSON WHO HAS BEEN SUBJECT TO THIS SANCTION IN THE ADMINISTRATION OF THE ETHICS IN GOVERNMENT ACT. THE GOVERNMENT RECENTLY, IN A FLURRY OF PUBLICITY, INITIATED A CIVIL PROCEEDING AGAINST SOMEBODY FOR VIOLATION OF THE ETHICS IN GOVERNMENT ACT. BUT THAT WAS, AS I SAY, EVEN WITH THE PUBLICITY, IT WAS A SORT OF PATH-BREAKING EVENT. AND HERE IS A CONGRESSMAN WHO IS BEING SINGLED OUT AND AS TO WHOM, EVEN IF ONE DOESN'T — LAYING TOTALLY TO ONE SIDE MATTERS OF SELECTIVE PROSECUTION, WHICH IS ANOTHER MOTION THAT WE MADE AND YOUR HONOR HAS DENIED THAT, BUT NONETHELESS, IN TERMS OF THE OBJECTIVE RECORD, WHAT WILL THE PUBLIC SAY IF THERE IS ONE PERSON WHO ENDS UP BEING SUBJECTED TO A JAIL TERM BECAUSE OF FAILURE TO INCLUDE ON HIS ETHICS IN GOVERNMENT ACT FORM CERTAIN ASSETS OR LIABILITIES, AND IN FACT HAS TO END UP SERVING THAT PRISON TERM? I SUBMIT THAT IN LIGHT OF THIS SUBSEQUENT

HISTORY, IT WILL APPEAR UNJUST TO THE PUBLIC, AND I SUBMIT IT IS SIMPLY NOT APPROPRIATE THAT IN VIEW OF THAT HISTORY AND THE EVENTS THAT HAVE TAKEN PLACE, THAT THAT BE DONE.

WE HAVE ALSO BROUGHT TO YOUR HONOR'S ATTENTION THE FACT THAT CONGRESS ITSELF IS CONSIDERING THE FACT THAT THIS IS UNJUST. THERE IS A STATUTE -- THAT IS, A BILL THAT HAS BEEN PUT IN IN BOTH THE SENATE AND THE HOUSE THAT WILL BE SUBJECT TO HEARINGS, AS MR. CAMPBELL'S LETTER TO YOUR HONOR INDICATES. AND THAT BILL ESSENTIALLY DECLARES THAT IT WAS CONGRESS' INTENT NOT TO HAVE CRIMINAL PROSECUTIONS, WHICH, AS YOUR HONOR IS AWARE, WAS A MATTER OF SUBSTANTIAL CONTROVERSY HERE AND IN THE COURT OF APPEALS. WE LOST ON THAT POINT BOTH HERE AND IN THE COURT OF APPEALS. BUT NONETHELESS, CONGRESS CAN CERTAINLY EXPRESS ITS INTENT, AND IF ITS INTENT IS EXPRESSED AS NOT WISHING ANY CRIMINAL SANCTION, BUT BY THAT TIME IF MR. HANSEN HAS BEEN SENTENCED TO A TERM OF IMPRISONMENT AND HAS BEEN REQUIRED TO SERVE IT, OF COURSE IT WILL BE A VAIN STATEMENT BY THE CONGRESS.

THESE ARE ALL FACTORS, THESE SUBSEQUENT EVENTS. AND, OF COURSE, IN EVERY CASE, I GUESS, WHERE A MOTION FOR A NEW TRIAL IS FILED, COUNSEL APPEARS BEFORE THE COURT AND SAYS, LOOK, THE CLIENT HAS SUFFERED SUBSTANTIALLY SINCE THE TIME OF THE IMPOSITION OF SENTENCE. IN THIS CASE, THERE ARE VERY OBJECTIVE PROOFS OF THAT, WHICH ARE: THE HOUSE REPRIMAND, THE DEFEAT AT THE POLLS IN IDAHO, AND THE COMPARISON WITH THESE OTHER CASES THAT HAVE BEEN IN THE PRESS AND THAT SHOW THAT IN TERMS OF THE

PUBLIC IMAGE, IT WOULD NOT BE VIEWED AS EVENHANDED JUSTICE TO SUBJECT CONGRESSMAN HANSEN TO THIS.

MR. CAMPBELL HAS SUBMITTED TO YOUR HONOR, AS WELL, TWO EDITORIALS FROM THE IDAHO PAPERS, AND THAT'S THE CONSTITUENCY THAT KNOWS CONGRESSMAN HANSEN, THAT WAS PROTECTED, ESSENTIALLY, BY THE ETHICS IN GOVERNMENT ACT. THE PURPOSE OF THAT PROVISION IN THE ETHICS IN GOVERNMENT ACT WAS PRECISELY TO PROTECT THE CONSTITUENCY AND SO THAT IT WOULD KNOW THE FACTS. THAT CONSTITUENCY HAS VOTED MR. HANSEN OUT OF OFFICE, BUT HAS SAID, I THINK, IN THOSE EDITORIALS, ENOUGH IS ENOUGH.

THIS MAN HAS SUFFERED. HE HAS UNDERGONE CONSIDERABLE PERSONAL ANGUISH. HE HAS HAD GREAT RETRIBUTION REAKED UPON HIM FOR HIS PARTICIPATION IN THESE FILINGS UNDER THE ETHICS IN GOVERNMENT ACT. AND FOR ALL THOSE REASONS, WE SUBMIT, YOUR HONOR, THAT IT WOULD BE APPROPRIATE TO REDUCE THE SENTENCE TO ELIMINATE ANY TERM OF IMPRISONMENT AND TO REDUCE THE FINE, AS WELL.

WE HAVE CITED TO YOUR HONOR AT THE CONCLUSION OF OUR MEMORANDUM A PROVISION OF THE NEW SENTENCING ACT WHICH AUTHORIZES A COURT IN THESE CIRCUMSTANCES TO IMPOSE, IF IT USES THE STATUTE, A PENALTY NOT EXCEEDING DOUBLE — IF IT'S A MULTIPLE COUNT OFFENSE, NOT EXCEEDING DOUBLE THE MAXIMUM PENALTY UNDER THE STATUTE. IT'S TRUE THAT UNDER THE SENTENCING REFORM ACT WHICH GOES INTO EFFECT IN NOVEMBER, IN THE CASE OF FELONIES IT MIGHT BE PERMISSIBLE FOR A COURT IN UNUSUAL CIRCUMSTANCES TO

IMPOSE EXCEEDINGLY HIGH PENALTIES, ON THE ONE HAND. ON THE OTHER HAND, TO THE EXTENT THAT THE COURT IS IMPOSING A PENALTY UNDER THE STATUTE, I THINK CONGRESS HAS SAID IF YOU ARE IMPOSING THE FINE PRESCRIBED BY THE STATUTE, DON'T TAKE MULTIPLE COUNTS AND USE THEM AS A BASIS FOR MULTIPLE TIMES THE FINE; NOT MORE, AT LEAST, THAN DOUBLE THAT FINE.

ALL THESE CIRCUMSTANCES, WE SUBMIT, YOUR HONOR, MAKE A COMPELLING BOTH HUMANITARIAN AND PERSONAL CASE FOR MR. HANSEN, BUT ALSO, I THINK, MAKE A COMPELLING CASE THAT IN THE INTERESTS OF JUSTICE, IN THE INTERESTS PRECISELY OF THE GENERAL DETERRENCE THAT I AM SURE YOUR HONOR HAD IN MIND WHEN YOU IMPOSED THAT SENTENCE INITIALLY, AT THIS TIME THAT SENTENCE SHOULD BE MODIFIED, SHOULD BE REDUCED SO THAT INSTEAD OF SERVING ANY TERM OF IMPRISONMENT, MR. HANSEN BE PLACED ON PROBATION FOR A PERIOD OF TIME AND THAT THE FINANCIAL PROVISION OF THE SENTENCE BE REDUCED TO A $20,000 FINE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. LEWIN.

WHY DON'T WE HEAR FROM MR. WEINGARTEN, IF HE IS THE ONE TO SPEAK FOR THE GOVERNMENT, AND THEN I WILL HEAR FROM MR. HANSEN FOLLOWING THAT.

GOOD MORNING.

MR. WEINGARTEN: GOOD MORNING YOUR HONOR.

MAY IT PLEASE THE COURT. YOUR HONOR, THERE IS A PRESUMPTION WHEN A COURT IMPOSES SENTENCE THAT THE COURT HAS

CAREFULLY CONSIDERED ALL THE RELEVANT FACTORS BEFORE IT, TAKEN INTO ACCOUNT ALL INFORMATION THAT BEARS UPON THE SENTENCING DECISION AND IMPOSES SENTENCE. I THINK THE ISSUE FOR A RULE 35 IS WHAT'S NEW, WHAT'S DIFFERENT NOW, WHAT'S HAPPENED THAT THE COURT DIDN'T ANTICIPATE WHEN THE COURT IMPOSED THE SENTENCE? WHY SHOULD THE COURT CHANGE WHAT WAS A CAREFULLY DECIDED POSITION?

IN THEIR BRIEF AND IN HIS ARGUMENT, MR. LEWIN BASICALLY OFFERS FIVE REASONS TO CHANGE THE SENTENCE. I WOULD LIKE TO GO THROUGH THEM ONE BY ONE.

HE POINTS TO THE SENTENCING REFORM ACT, AND I GUESS HIS BASIC POSITION IS THAT CONGRESS HAS TAKEN A STAND THAT ONLY VIOLENT DEFENDANTS WHO ARE CONVICTED SHOULD GO TO JAIL. THAT'S JUST SIMPLY NOT CORRECT. THAT'S PREFATORY LANGUAGE. OBVIOUSLY, THERE IS A BIAS TOWARDS GIVING CONSIDERATION TO OTHER ALTERNATIVES. IN SERIOUS CASES, COURTS THROUGHOUT THE LAND SEND NONVIOLENT WHITE-COLLAR CRIMINALS TO JAIL. IN A NEIGHBORING COURTROOM JUST A FEW MONTHS AGO, IVAN O'DONALD IN A NONVIOLENT CASE WAS SENTENCED TO JAIL. A FEW MONTHS AGO, I WAS IN COURT WHEN A UNITED STATES DISTRICT COURT JUDGE IN MISSISSIPPI RECEIVED FIVE YEARS IN JAIL FOR PERJURY. THESE ARE OBVIOUSLY NONVIOLENT CRIMES, THESE ARE WHITE-COLLAR CRIMES. IN THE APPROPRIATE CASE, THE COURT RETAINS THE AUTHORITY TO SENTENCE WHITE-COLLAR DEFENDANTS TO JAIL.

INTERVENING EVENTS. MR. LEWIN POINTS BASICALLY TO TWO:

LOSS OF THE ELECTION BY MR. HANSEN AND HIS REPRIMAND. NO ONE DISPUTES AND NO ONE CAN DISPUTE THAT THESE ARE NEGATIVE THINGS THAT HAVE OCCURRED TO CONGRESSMAN HANSEN SUBSEQUENT TO THE CONVICTION. BUT CAN IT BE SAID THAT THEY WERE NOT ANTICIPATED BY THE COURT WHEN THE COURT IMPOSED THE SENTENCE? THE DEFENDANT WAS CONVICTED OF PROVIDING FALSE INFORMATION TO HIS COLLEAGUES AND TO HIS CONSTITUENTS. IS IT A SURPRISE OR WAS IT NOT ANTICIPATED THAT BOTH GROUPS ACTED ADVERSELY OR TO THE DETRIMENT OF CONGRESSMAN HANSEN AS A RESULT OF THE DISCLOSURE OF THESE FACTS? WHAT WAS TO BE EXPECTED, IF NOT THESE ADVERSE CONSEQUENCES?

EVERY TIME A PERSON WITH SOMETHING TO LOSE IS SENTENCED TO PRISON -- OR NOT EVERY TIME, BUT FREQUENTLY, COLLATERAL ADVERSE CONSEQUENCES FOLLOW. IF A BANK OFFICIAL EMBEZZLES MONEY, IN ADDITION TO A JAIL SENTENCE, HE TYPICALLY LOSES HIS JOB. IF A GOVERNMENT OFFICIAL IS CONVICTED OF TREASON, FREQUENTLY HE LOSES HIS JOB AS WELL AS A PRISON SENTENCE IS IMPOSED. THIS IS NO DIFFERENCE. CERTAINLY THERE ARE ADVERSE CONSEQUENCES FLOWING OUT OF THE EXPOSURE OF CONGRESSMAN HANSEN'S MISCONDUCT. THIS IS NOT UNUSUAL. COURTS DO NOT ROUTINELY TAKE THE POSITION THAT THAT FACT REQUIRES THAT A JAIL SENTENCE BE ELIMINATED. THE IMPORTANT THING IS THAT THESE CONSEQUENCES WERE CAUSED ONLY BY HIS CONDUCT AND CAME BECAUSE OF THE DISCLOSURE OF HIS MISCONDUCT.

A DOUBLE STANDARD? I THINK THE RECORD NEEDS TO BE SET

STRAIGHT. CONGRESSMAN HANSEN IS NOT THE ONLY INDIVIDUAL WHO HAS BEEN PROSECUTED FOR VIOLATING THE EIGA, PROSECUTED FOR 1001 IN CONNECTION WITH FALSE STATEMENTS. A UNITED STATES DISTRICT JUDGE, HARRY CLAYBORNE, WAS PROSECUTED FOR SUCH AN OFFENSE IN NEVADA. NOW, HE WAS ACQUITTED. A VERY HIGH RANKING POSTAL OFFICIAL, MR. JAQUISH, WAS CONVICTED IN THIS COURTHOUSE FOR JUST SUCH AN OFFENSE. A HIGH-RANKING OFFICIAL AT NASA, HERMAN THOMASSON, WAS CONVICTED AND SENTENCED TO PRISON IN THIS -- I DON'T KNOW IF IT WAS IN THIS COURTHOUSE; IT WAS EITHER HERE OR IN VIRGINIA, I'M NOT SURE, BUT FOR VIOLATING 1001. ASSISTANT SECRETARY FOR THE NAVY, MR. SAWYER, WAS PROSECUTED FOR 1001 IN CONNECTION WITH THE EIGA FORM. THERE HAVE BEEN MANY OTHER INVESTIGATIONS IN WHICH THERE IS A DECLINATION, MANY OTHER INVESTIGATIONS IN THE PIPELINE.

SIMPLY TO SAY THAT CONGRESSMAN HANSEN IS THE ONLY PERSON TO BE SUBJECTED TO PROSECUTION UNDER THIS THEORY IS FALSE.

NOW, IF I REACH 100 AND MR. LEWIN REACHES 100, WE WILL NEVER AGREE, I'M SURE, ON THE IMPORT OF THE EVIDENCE AT THIS TRIAL. WE SUBMITTED AT TRIAL, WE SUBMITTED IN OUR BRIEFS, WE SUBMIT NOW THAT CONGRESSMAN HANSEN'S CONDUCT FELL CLEARLY WITHIN THE IMPROPER, ILLEGAL OR CRIMINAL STANDARDS SET BY THE DEPARTMENT OF JUSTICE. WE RESPECTFULLY SUBMIT THAT VIRTUALLY EVERYTHING HE TOUCHED THAT WAS ELICITED IN THIS COURTROOM SMACKED OF FRAUD AND MISREPRESENTATION.

I THINK ANOTHER THING SHOULD BE INDICATED. THE COURT WILL RECALL THAT THIS IS NOT CONGRESSMAN HANSEN'S FIRST GO-AROUND WITH FALSE SUBMISSIONS. I THINK THIS IS AN IMPORTANT POINT THAT DISTINGUISHES THIS CASE FROM OTHER CASES THAT MR. LEWIN HAS RAISED. YOU WILL RECALL THAT IN 1975, JUDGE HART SENTENCED GEORGE HANSEN TO PRISON. BOB BENNETT, HIS LAWYER, STOOD UP AND SAID SOMETHING TO THE EFFECT IT WAS STUPIDITY, IT WAS NOT VENALITY OR NOT CRIMINALITY, AND JUDGE HART GAVE GEORGE HANSEN A BREAK. BASICALLY, THE CONDUCT IN THE CASE IN 1975 WAS A CARBON COPY OF WHAT GEORGE HANSEN WAS PROSECUTED IN THIS INSTANCE. A DIFFERENT STATUTE, BUT WE ARE TALKING ABOUT FALSE FILING, WE ARE TALKING ABOUT SHUFFLING MONEY THROUGH A VARIETY OF ACCOUNTS.

SHOULD HE BE GIVEN A SECOND CHANCE IN THIS CASE? WE RESPECTFULLY SUBMIT NOT.

DETERRENCE? WE THINK IT SENDS THE WRONG SIGNAL FOR A PERSON TO BE CONVICTED OF SERIOUS CRIME, SERIOUS FELONIES, THAT INVOLVE VIOLATION OF THE PUBLIC TRUST, BE SENTENCED TO JAIL, PURSUE EVERY APPEAL IN THE APPELLATE PROCESS, COME BACK TO COURT WITH NOTHING MORE THAN WHAT HAS BEEN ELICITED IN THIS COURTROOM TODAY AND HAVE THE PRISON SENTENCE ELIMINATED.

3572, AS FAR AS THE FINES ARE CONCERNED, MR. LEWIN IS CORRECT, OR I DON'T KNOW IF HE SAID THIS EXPRESSLY,: THAT PROVISION DOES NOT COME INTO EFFECT UNTIL NOVEMBER, 1986. IF THE COURT DOES TAKE INTO ACCOUNT THE NEW SENTENCING ACT IN

CONNECTION WITH THE FINES, THE COURT WOULD BE EMPOWERED TO FINE GEORGE HANSEN UP TO A QUARTER OF A MILLION DOLLARS PER FELONY. BUT SINCE THE COURT WOULD NOT BE SO EMPOWERED BECAUSE IT DOES NOT COME INTO EFFECT UNTIL NOVEMBER 1, 1986, THE FINES IMPOSED ARE ENTIRELY PROPER.

I THINK AN IMPORTANT POINT IS THAT IN ALL OF THE EVENTS THAT HAVE TAKEN PLACE SINCE CONVICTION IN THIS CASE, THERE HAS NOT BEEN ANY DEMONSTRATION BY THE DEFENDANT OF REMORSE. THERE HAS NOT BEEN ANY DEMONSTRATION BY THE DEFENDANT OF CONTRITION. THERE HAS BEEN NO ACCEPTANCE OF RESPONSIBILITY FOR HIS MISDEEDS. AND MAYBE POLITICALLY, FOR WHATEVER REASON, HE CAN'T DO THAT. CERTAINLY A FREE COUNTRY, HE IS NOT REQUIRED TO DO THAT PUBLICLY. BUT BEFORE THE GOVERNMENT WILL SIGN OFF ON ANY RULE 35 PROCEEDING IN THIS CASE, WE BELIEVE AT THE VERY LEAST THERE SHOULD BE ACCEPTANCE OF RESPONSIBILITY FOR MISDEEDS. INSTEAD, ALL WE GET IN THE PRESS STATEMENTS FROM THE DEFENDANT SINCE CONVICTION IS THAT HE DIDN'T GET A FAIR TRIAL, THAT HE IS NOT GUILTY, HE IS ENTIRELY — IT'S ENTIRELY HIS RIGHT TO SAY THOSE THINGS, AND IF HE BELIEVES THEM, THAT'S ENTIRELY HIS RIGHT TO BELIEVE THEM. BUT BEFORE THE GOVERNMENT WILL COME INTO COURT AND SIGN OFF ON A RULE 35 IN THIS CASE, WE BELIEVE AT A MINIMUM THERE SHOULD BE AN ACCEPTANCE OF RESPONSIBILITY FOR HIS MISDEEDS.

THE FACT THAT THERE IS A BILL IN CONGRESS RIGHT NOW CALLING FOR THE DECRIMINALIZATION OF THE EIGA FORMS, THAT'S NO

SURPRISE. 123 CONGRESSMEN MEN SIGNED ON MR. LEWIN'S APPELLATE BRIEF. THAT DID NOT CAUSE THE COURT OF APPEALS NOR THE SUPREME COURT TO DO ANYTHING BUT RULE CORRECTLY, IN OUR VIEW, AND THAT WAS AFFIRMING THIS COURT'S DECISION THAT 1001 PROSECUTIONS ARE ENTIRELY APPROPRIATE WHEN IT COMES TO FALSE FILINGS.

THE ALTERNATIVE, THIS LEGISLATION -- JUST AN ASIDE THAT'S A BRIEF ONE -- WOULD MEAN THAT -- IF THIS LEGISLATION PASSES, IT WOULD MEAN THAT IF SOMEONE APPLIES FOR A GOVERNMENT POSITION AND FILLS OUT A 171 FORM AND WILLFULLY FILES FALSE INFORMATION ON THAT FORM, THE GOVERNMENT WOULD BE ENTITLED TO PROSECUTE THAT PERSON FOR 1001. IF THE LEGISLATION PASSES, ON THE OTHER HAND, THE CONGRESSMAN WHO FILES FALSE FORMS TO HIS CONSTITUENTS AND TO HIS PEERS WOULD NOT BE SUBJECT TO 1001 PROSECUTION. IF AN INDIVIDUAL GOES DOWN TO THE BANK AND FILES A FALSE FINANCIAL DISCLOSURE FOR A LOAN, HE COULD BE PROSECUTED FOR A FELONY UNDER 1014. BUT THE CONGRESSMAN, OR THE EXECUTIVE BRANCH OFFICIAL, IF THERE IS DECRIMINALIZATION HERE, WHO FILES FALSE FINANCIAL INFORMATION -- AND THE COURT -- TO HIS PEERS OR TO CONSTITUENTS WOULD NOT BE SUBJECT TO PROSECUTION.

NOW, CONGRESS, OF COURSE, IS EMPOWERED TO PRODUCE SUCH AN ANOMALOUS RESULT. I WOULD SUBMIT THAT THE COURT SHOULD HAVE NOTHING TO DO WITH ENCOURAGING SUCH AN ANOMALOUS RESULT.

YOUR HONOR, THE COURT TOOK INTO ACCOUNT ALL THE RELEVANT FACTORS WHEN FIRST IMPOSING SENTENCE. I DON'T THINK ANYTHING HAS OCCURRED SINCE SENTENCE THAT CAUSES A DIFFERENT

RESULT. SERIOUS CRIMES WERE COMMITTED IN THIS CASE. I THINK IT IS ENTIRELY APPROPRIATE THAT THE SENTENCE BE CONTINUED.

THANK YOU.

THE COURT: MR. LEWIN, SINCE THIS IS STILL A MOTION COMBINED, INTER ALIA, WITH YOUR PLEA FOR GENERAL LENIENCY. YES, SIR.

MR. LEWIN: THANK YOU, YOUR HONOR.

LET ME SAY FIRST WITH REGARD TO MR. WEINGARTEN'S LAST POINT, I DON'T THINK HE MEANS TO SUGGEST TO THE COURT THAT THE BILL THAT'S BEFORE CONGRESS APPLIES DIFFERENT STANDARDS FOR CONGRESSMEN THAN FOR EXECUTIVE BRANCH PERSONNEL. IT APPLIES TO ALL THREE BRANCHES. IT WOULD REMOVE, OR IT WOULD SAY THAT CONGRESS NEVER INTENDED AN EIGA PENALTY FOR ANY MEMBER OF ANY BRANCH, EXECUTIVE, LEGISLATIVE, OR JUDICIAL, IF THEY SUBMITTED IT. THE FACT THAT THERE MIGHT BE SOME OTHER FORMS THAT MIGHT BE SUBJECT TO 1001 UNDER CERTAIN CIRCUMSTANCES, LIKE APPLICATION FORMS, INDEED, THAT MAY BE TRUE; IT WILL BE TRUE UP IN THE CONGRESS, AS WELL. TO THE EXTENT THAT A CONGRESSMAN SUBMITS SOME OTHER FORM THAT'S SUBJECT TO SECTION 1001, OF COURSE HE COULD BE PROSECUTED. SO, I DON'T THINK THERE IS ANY ANOMALY AT ALL IN THAT BILL. BUT, OF COURSE, THAT BILL ISN'T BEFORE YOUR HONOR. THE QUESTION JUST IS WHETHER, GIVEN THE FACT THAT THERE IS A SUBSTANTIAL CONGRESSIONAL SENTIMENT, AS MR. WEINGARTEN HAS INDICATED, THAT SUPPORTS THE POSITION THAT THERE WAS NO CRIMINAL SANCTION IMPOSED, SINCE THERE MAY VERY WELL BE LEGISLATION THAT

DECLARES THAT, IS IT APPROPRIATE IN THOSE CIRCUMSTANCES FOR MR. HANSEN TO BE SENT TO JAIL.

THAT BRINGS ME TO THE OTHER MATTER. MR. WEINGARTEN CITES A NUMBER OF CASES, CLAYBORNE, THOMPSON, SAWYER, WHERE HE SAYS PEOPLE WERE INDICTED FOR EIGA OFFENSES. OF COURSE. BUT THE POINT IS, IN THOSE CASES THERE WERE JOINED IN THOSE INDICTMENTS CHARGES OF OTHER UNDERLYING OFFENSES. JUDGE CLAYBORNE WAS CHARGED WITH BRIBERY AND TAX EVASION. HE IS NOW IN JAIL ON TAX EVASION. MR. HANSEN WASN'T CHARGED WITH TAX EVASION. HE WASN'T CHARGED WITH BRIBERY. NO MATTER WHAT MR. WEINGARTEN SAYS HERE IN TERMS OF WHAT HE THINKS THE EVIDENCE SHOWS, THE FACT IS HE DID NOT PRESENT, HE DIDN'T ARGUE TO THE GRAND JURY, HE DIDN'T ASK THAT MR. HANSEN BE TRIED ON ANY UNDERLYING CRIMINAL CHARGE, AND I SUBMIT THAT THAT'S BECAUSE THERE WAS NO UNDERLYING CRIMINAL CHARGE THAT WOULD HAVE FALLEN WITHIN THE JUSTICE DEPARTMENT GUIDELINES. AND THAT MAKES THE CASE ENTIRELY DIFFERENT FROM THOSE SITUATIONS WHERE PEOPLE, IN ADDITION TO A BRIBERY OR A RECEIPT OF A BRIBE CHARGE OR IN ADDITION TO A TAX EVASION CHARGE, ARE ALSO CHARGED WITH A VIOLATION OF THE ETHICS IN GOVERNMENT ACT UNDER 18 U.S.C. 1001.

NOW, MR. WEINGARTEN RAISES THE QUESTION OF WHAT HE CALLS THE FIRST GO-ROUND, THE PRIOR MISDEMEANOR CONVICTION OF CONGRESSMAN HANSEN. YOUR HONOR WILL RECALL THAT, (A) WITH REGARD TO THE TRIAL, CERTAINLY WE HAD GONE INTO A PRESENTATION WITH REGARD TO THAT. AND YOUR HONOR SUSTAINED OUR POSITION THAT

THAT WAS NOT EVEN RELEVANT IF MR. HANSEN HAD TAKEN THE STAND AT THE TRIAL. AND THE REASON FOR THAT WAS THAT THE RECORD DEMONSTRATED THAT, INDEED, IT WAS NOT OF A PART WITH WHAT WAS BEING CHARGED IN THIS CASE. IT WAS A VERY, VERY TECHNICAL OFFENSE AS TO WHICH JUDGE HART ADMITTED, I THINK AND SAID AT THE TIME, IN ADDITION TO THE REMARK THAT MR. WEINGARTEN QUOTES, THAT HE HAD SOME QUESTION AS TO WHY THE GOVERNMENT HAD BROUGHT IT AS A PROSECUTION BECAUSE IT WAS A TECHNICAL OFFENSE AS TO WHICH ALL SORTS OF OTHER PEOPLE COMMITTED SIMILAR KINDS OF OFFENSES. THERE WAS A BIG MISUNDERSTANDING AT THAT TIME. THAT WAS THE REASON THAT THE ORIGINAL SENTENCE WAS VACATED. AND I THINK IT IS REALLY NOT APPROPRIATE TO BE CONSIDERING THAT AS A BASIS FOR AN ENHANCED SENTENCE AT THIS TIME.

MOREOVER, YOUR HONOR HAD THAT IN MIND AT THE TIME OF THE ORIGINAL SENTENCE. YOUR HONOR KNEW ABOUT THAT. AND THE QUESTION IS: DO THE CIRCUMSTANCES SINCE THE IMPOSITION OF THE 5 TO 15 MONTH SENTENCE CHANGE THE JUSTIFICATION FOR THAT?

AND AS TO THE MATTER OF LOSING -- THE NECESSARY CONSEQUENCES THAT GROW OUT OF A SENTENCE, IT'S TRUE. AGAIN, THE COURT KNOWS WHAT CONSEQUENCES WILL FLOW FROM A SENTENCE IF IT IS SOMEBODY WHO IS A GOVERNMENT EMPLOYEE OR THAT KIND OF THING. THAT'S KNOWN AT THE TIME OF THE SENTENCE. IN THIS CASE, I SUBMIT, YOUR HONOR, I DON'T THINK ANYBODY IN THIS COURTROOM, NOT THE COURT, NOT THE REPORTERS, AND CERTAINLY NOT THE ATTORNEYS -- I DIDN'T KNOW WHAT THE RESULT WOULD BE IN IDAHO IN THAT

CONGRESSIONAL ELECTION AS A RESULT OF THE CONVICTION, AND THE RESULTS PROVE IT. A 171-VOTE MARGIN IT SEEMS TO ME DEMONSTRATES THAT NOBODY COULD HAVE PREDICTED THAT CONGRESSMAN HANSEN WOULD NECESSARILY BE DEPRIVED OF HIS SEAT IN CONGRESS. AND IF WE WERE HERE TODAY WITH HIM HAVING BEEN REELECTED TO THE CONGRESS AND HIM SITTING HERE AS A SITTING CONGRESSMAN, THEN YOUR HONOR, I SUBMIT WOULD BE JUSTIFIED IN SAYING "WHAT I THOUGHT THEN IS WHAT SHOULD BE IMPOSED NOW, BECAUSE YOU HAVE NOT SUFFERED AND THERE HAS BEEN NO GENERAL DETERRENCE TO THE PUBLIC."

ON THE OTHER HAND, IT'S QUITE A DIFFERENT RECORD WHEN YOU LOOK AT THIS MAN NOW AS HE IS, I THINK, CRUSHED BY WHAT HAS HAPPENED IN THE PAST, AND HAVING SUFFERED THE CONSEQUENCES AND HIS FAMILY HAVING SUFFERED THE CONSEQUENCES. SO ALL THOSE REASONS, YOUR HONOR, WE SUBMIT JUSTIFY A REDUCTION OF THE SENTENCE.

AND FOR MR. WEINGARTEN TO SAY, WELL, THE GOVERNMENT WOULD SIGN ON TO A RULE 35 MOTION IF THE DEFENDANT WOULD MAKE A STATEMENT INVOLVING WHAT HE CALLS CONTRITION, YOUR HONOR IS AWARE OF THE POSITION THAT THE DEFENDANT TOOK AT THE TIME OF TRIAL. I THINK IT'S AN UNFAIR REQUEST, QUITE FRANKLY, TO SAY IN THESE CIRCUMSTANCES -- FOR THE GOVERNMENT TO SAY, WELL, NOW, LOOK, WHAT WE'RE SAYING TO YOU IS MAKE A PUBLIC STATEMENT TO THE PRESS WHEN YOUR CONDUCT WHICH WAS LITIGATED IN THE COURTROOM, YOU HAD A POSITION THAT WAS STATED IN THE COURTROOM, IT WAS PRESENTED, AND WE, AS A CONDITION FOR SAYING THAT YOU DON'T GO

TO JAIL SAY, LOOK, WHAT YOU'VE GOT TO DO IS MAKE A STATEMENT TO THE PRESS SAYING THAT THERE IS CRIMINAL VIOLATIONS HERE. I CAN TELL YOUR HONOR THAT THE DEFENDANT'S POSITION IS THAT HE VERY -- AND I THINK HE SAID IT AT THE TIME OF THE INITIAL SENTENCING, THAT HE VERY MUCH REGRETS THE MATTERS THAT HE DID, THE ACTIONS THAT HE TOOK; THAT THEY RESULTED IN THIS VERY, VERY SEVERE CONSEQUENCE UPON HIM. AND THAT REMAINS HIS POSITION TO THIS DAY.

I KNOW YOUR HONOR HAS SAID THAT HE HAS THE RIGHT TO ELOCUTE AS IF THIS WERE ANOTHER SENTENCING. WE HAD DISCUSSED THIS BEFORE THIS SESSION THIS MORNING. THE DEFENDANT ADVISED ME THAT HIS VIEW WAS THAT HE HAD SAID WHAT HE REALLY HAD TO SAY AT THE TIME OF THE PRIOR SENTENCING. AND UNLESS -- I MEAN I WILL CONSULT WITH HIM AGAIN. UNLESS HE FEELS THAT THAT POSITION HAS CHANGED, I DON'T KNOW WHETHER THERE WOULD BE ANY STATEMENT BEING MADE BY THE DEFENDANT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. HANSEN, IS THERE ANY STATEMENT THAT YOU WISH TO MAKE, AS YOU ARE ENTITLED TO BY LAW, AT THIS TIME OF SENTENCING?

MR. HANSEN: YOUR HONOR, I SINCERELY APPRECIATE THIS OPPORTUNITY FOR A BRIEF STATEMENT. AS MY COUNSEL SUGGESTED, I HAD NOT PLANNED TO TAKE THIS TIME IN COURT. I HAVE A FEW HANDWRITTEN THINGS THAT I THOUGHT I MIGHT SAY UNDER THE CIRCUMSTANCES. AND I CAN'T ADD MUCH TO A BRILLIANT ATTORNEY WHO HAS REPRESENTED ME. I THINK HE HAS DONE VERY WELL. AND I DON'T

KNOW WHETHER I'M IN LEAGUE TO STAND AGAINST THE PROSECUTION. BUT I DO HAVE A FEW POINTS THAT I WOULD LIKE TO MAKE TO YOU, IF I HAVE YOUR PERMISSION.

THE PROSECUTION TALKED ABOUT REMORSE. I DON'T KNOW WHAT IT TAKES TO HAVE REMORSE FOR HAVING BEEN PUT THROUGH WHAT I HAVE UNLESS I WERE TO CRAWL TO THEIR FEET AND ASK FOR THEIR FORGIVENESS. IT'S VERY OBVIOUS, AS MR. LEWIN STATED, THAT THERE HAS BEEN A GREAT PENALTY TO PAY. AND THE CASE HAS BEEN A VERY PAINFUL EXPERIENCE FOR ME AND MY FAMILY. THE COST HAS BEEN ENORMOUS FINANCIALLY IN TERMS OF COSTING ME MY CAREER AND THE HARM IT HAS DONE TO MY REPUTATION, AS WAS STATED. AND CERTAINLY I DEEPLY REGRET THIS TERRIBLE INCIDENT, MISUNDERSTANDING, MY CONDUCT. AND, OF COURSE, I WILL DO EVERYTHING POSSIBLE TO AVOID SUCH PROBLEMS IN THE FUTURE.

YOUR HONOR, AS I STATED BEFORE YOU ON JUNE 15TH, 1984, THE MATTER AT ISSUE, AS I SEE IT, IS BASICALLY HOW TO FILL OUT A GOVERNMENT FORM AND WHETHER IT WAS DONE HONESTLY. YOUR HONOR, I HAD PROFESSIONAL AND RESPECTED LEGAL ADVICE WHO WORKED DIRECTLY YEAR AFTER YEAR, NOT JUST WITH ME, BUT WITH THE HOUSE COMMITTEE ITSELF WHERE REPORTS WERE FILED, AND THE RECORD OF THIS CONTACT IS THERE.

AND, YOUR HONOR, I DON'T KNOW WHERE MR. WEINGARTEN COMES FROM, BUT I WENT TO THE JUSTICE DEPARTMENT. I VOLUNTEERED MY FULL RESPONSE -- OR PERSONAL DISCLOSURE, EXCUSE ME, TO HELP CAPTURE A BLACKMAILER. THEY DIDN'T HAVE TO COME TO ME AND SEEK

ME OUT.

I WENT TO THE PRESS WHEN THE JUSTICE DEPARTMENT WAS DRAGGING THEIR FEET, AND I PROVIDED FULL INFORMATION ON MATTERS AT ISSUE WHEN THE JUSTICE DEPARTMENT WASN'T DOING, SEEMINGLY, ANYTHING. THERE HASN'T BEEN ANY HIDING OF ANYTHING.

AND, YOUR HONOR, I DID NOT JUST FORGET TO LIST ITEMS IN THE EIGA REPORT AS DID MR. MEESE, AS MR. LEWIN SUGGESTED. I WENT TO THE COMMITTEE BEFORE EVER SIGNING THE FORMS AND I DISCUSSED MY SITUATION. THERE WAS NO HIDING, YOUR HONOR. I DID NOT IMPROPERLY CHECK THE WRONG BOX REGARDING SPOUSE DISCLOSURE ON THE EIGA FORMS AS DID MS. FERRARO. I AND MY LAWYERS DISCUSSED THIS, AND THE COMMITTEE EVEN ASKED AN ADVISORY OPINION. THERE WAS NO HIDING. AND I DID NOT LEAVE OFF A LONG LIST OF CORPORATE CONTRIBUTIONS FROM MY EIGA FORMS AS DID MR. DANIEL. MY PROBLEM WAS HOW TO HONORABLY PAY OFF A POLITICALLY INCURRED DEBT, A PROBLEM CONTINUOUSLY DISCUSSED WITH THE COMMITTEE BEFORE TAKING ACTION OR SIGNING FORMS. AGAIN, THERE WAS NO HIDING.

AND, YOUR HONOR, THE COMMITTEE IN THE CASE BEFORE THIS COURT NEVER DID ADVISE ME IN ANY FORMAL OFFICIAL OR RECORDED WAY THAT MY FILINGS WERE DEFICIENT. IN FACT, I CONTINUED TO FILE OVER A PERIOD OF YEARS, AND THERE CONTINUED TO BE CONTACT BETWEEN MY LAWYERS AND THE COMMITTEE STAFF DIRECTOR MONITORING MY FILINGS. AND THERE NEVER WAS A NOTICE OF DEFICIENCY SERVED.

YOUR HONOR, THIS IS YEAR AFTER YEAR. AND THE COMMITTEE

AND MY ATTORNEYS CONTINUED TO TALK. AND WE NEVER RECEIVED A FORMAL NOTICE — NOT JUST THE NOTICE IN QUESTION AS TO WHETHER IT WAS MAILED OR NOT, THOSE THINGS THAT ARE INCLUDED IN THE LEGAL PAPERS. BUT THIS IS YEAR AFTER YEAR. THERE WAS NEVER A DEFICIENCY NOTED. AND THERE WAS NO HIDING.

YOUR HONOR, I REALIZE I COULD HAVE BEEN MORE PRECISE AND MORE CAREFUL IN MY DEALINGS WITH THE COMMITTEE. MAYBE I COULD HAVE PUSHED MORE FOR SOME KIND OF DOCUMENTATION. BUT IN CONGRESS -- AND YOU HAVE TO BE THERE, SOMETIMES, TO UNDERSTAND — SOMETIMES BECAUSE OF POLITICAL NUANCES THEY PREFER TO DEAL ON A PERSON-TO-PERSON BASIS AND NOT MAKE A RECORD. AND APPARENTLY THE SPOUSE DISCLOSURE PROBLEM WAS ONE OF THOSE ISSUES WHERE THEY WERE AFRAID TO MAKE SOME KIND OF A PUBLIC PROCLAMATION.

WELL, THIS WHOLE PROBLEM OF NOT GETTING A BETTER PUBLIC RECORD HAS BEEN PAINFULLY BROUGHT OUT IN THE YEARS OF THE INVESTIGATION AND THE COURT ACTION. AND I DO DEEPLY REGRET THAT I DID NOT FORESEE THIS AND PROVIDE A CLEARER COURSE OF ACTION.

YOUR HONOR, I DON'T KNOW WHAT MORE I CAN SAY TO TELL THE PROSECUTION THAT THERE IS REMORSE. THERE IS REMORSE, YOUR HONOR. I AM VERY SORRY FOR THE FACT THAT WE'RE HERE, I'M VERY SORRY THAT SOMEHOW WE WERE NOT MORE CAREFUL IN WHAT WE DID. BUT I MUST LEAVE THIS WITH YOU, YOUR HONOR: THERE WAS NO HIDING.

THANK YOU.

THE COURT: ALL RIGHT. THE MOTION FOR REDUCTION OF

SENTENCE IS DENIED.

GENERAL DETERRENCE WAS ONE OF THE CONSIDERATIONS OF THE COURT AT THE TIME OF THE ORIGINAL SENTENCE TWO YEARS AND ONE DAY AGO TODAY. OF COURSE, THE OTHER CONSIDERATIONS WERE IN EFFECT TOO: REHABILITATION, PUNISHMENT, THE EXAMPLE. ANOTHER INTER ALIA CONSIDERATION, NOT THE EXCLUSIVE CONSIDERATION, WAS, OF COURSE, MR. HANSEN'S PRIOR RECORD FOR FAILURE TO FILE REPORTS OF POLITICAL CONTRIBUTIONS AND EXPENDITURES, A PRIOR OFFENSE. HE WAS IN THAT CASE FINED ON EACH COUNT $1,000, FOR A TOTAL OF $2,000, AND WE ARE ALL AWARE OF THE CIRCUMSTANCES THAT DON'T NEED RETELLING.

MR. LEWIN REFERS TO THE APPEARANCE OF EVENHANDEDNESS. WE HAVE BEFORE US AN INDIVIDUAL, A DEFENDANT WHO HAS BEEN CONVICTED BY A JURY AFTER FULL AND FAIR AND A FIRM TRIAL OF FOUR SEPARATE COUNTS INVOLVING FOUR SEPARATE YEARS OF DERELICTION. THE FINES THAT THE COURT IMPOSED GO ONE FINE TO EACH OF THOSE YEARS.

THE COURT AT THE TIME THAT IT GAVE ITS ORIGINAL SENTENCE CONSIDERED ALL OF THE FACTORS THAT WERE PRESENTED TO THE COURT THROUGH BOTH COUNSEL, THROUGH MR. HANSEN, THROUGH THE PRESENTENCE REPORT, THROUGH THE KNOWLEDGE OF THE TRIAL. THE COURT HAS CONSIDERED ALL OF THE MATTERS THAT HAVE BEEN PLACED BEFORE THE COURT, INCLUDING THE LATEST SUBMISSION BY MR. CAMPBELL THIS FRIDAY PAST. THE COURT HAS HEARD THE ARGUMENT OF COUNSEL AND THE ARGUMENT OF MR. HANSEN.

MR. HANSEN, WILL YOU COME BEFORE THE LECTERN, PLEASE, FOR THE IMPOSITION OF SENTENCE. YOU MAY BE, OF COURSE, ACCOMPANIED, IF YOU WISH, BY YOUR COUNSEL.

THIS IS AN APPROPRIATE CASE, MR. HANSEN, AS I HAVE SAID, IN WHICH TO AFFIRM THE ORIGINAL SENTENCE, AND THERE IS NO PERSUASIVE REASON TO DO OTHERWISE. YOU ARE SENTENCED, AS BEFORE, IN AN EXACT REPETITION OF WHAT THE SENTENCE WAS BEFORE: 5 TO 15 MONTHS ON EACH COUNT AND A FINE OF $10,000 ON EACH COUNT, THAT IS, COUNT 1, COUNT 2, COUNT 3, COUNT 4. THE 5- TO 15-MONTH INCARCERATION SENTENCE SHALL RUN CONCURRENTLY. THE FINES SHALL BE SEPARATE, ACCUMULATING TO A TOTAL OF $40,000.

YOU ARE TO REPORT THIS THURSDAY, THE 19TH OF JUNE, 1986, AT 11:00 A.M. BY VOLUNTARY SURRENDER TO PETERSBURG CAMP IN PETERSBURG, VIRGINIA, A DESIGNATION SELECTED FOR YOU BY MR. NORMAN CARLSON, THE DIRECTOR OF THE BUREAU OF PRISONS. I WOULD ASK THAT YOU AND YOUR COUNSEL TALK TO THE PROBATION OFFICER FOLLOWING THIS HEARING TODAY TO WORK OUT ALL THE DETAILS AND RAMIFICATIONS OF THAT, BUT I AM CONFIDENT THAT A VOLUNTARY SURRENDER IS AN APPROPRIATE SURRENDER IN THIS CASE.

IT IS MY DUTY TO TELL YOU THAT YOU HAVE A RIGHT TO APPEAL. THAT APPEAL MUST BE POSTED WITHIN TEN DAYS FROM THIS DATE, AS I'M CONFIDENT YOUR COUNSEL WELL KNOWS, OR YOU WILL FOREVER FOREGO YOUR RIGHT TO APPEAL.

I WISH YOU GOOD LUCK.

THE WITNESS: THANK YOU.

MR. LEWIN: YOUR HONOR.

THE COURT: MR. LEWIN.

MR. LEWIN: MIGHT WE AT THIS TIME FILE WITH THE CLERK A NOTICE OF APPEAL FROM YOUR HONOR'S RULING.

THE COURT: ALREADY PREPARED, MR. LEWIN?

MR. LEWIN: YES, ALREADY PREPARED, YOUR HONOR.

THE COURT: RIGHT.

MR. LEWIN: WHICH IS A NOTICE OF APPEAL FROM THE RULING DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE AND THE MOTION FOR NEW DISCOVERY CONCERNING SELECTIVE PROSECUTION.

THAT WAS FOR THE MOTIONS THAT YOUR HONOR RULED UPON LAST WEEK. WE, OF COURSE, HAVE NOT -- SINCE WE DID NOT KNOW ABOUT THE RULING TODAY, DID NOT FILE A NOTICE OF APPEAL FROM TODAY'S RULING REGARDING THE REDUCTION OF SENTENCE, BUT WE WILL TAKE INTO ACCOUNT YOUR HONOR'S STATEMENT AND DETERMINE WHETHER TO FILE A SEPARATE NOTICE OF APPEAL FROM THOSE.

THE COURT: MAY I SUGGEST THAT IF YOU DO SO DECIDE TO DO, MR. LEWIN, THAT IT BE DONE PROMPTLY SO THAT ALL OF THE MATTERS COULD BE CONSIDERED TOGETHER --

MR. LEWIN: DEFINITELY, YOUR HONOR.

THE COURT: -- BY ANY REVIEWING BODY.

MR. LEWIN: LET ME ALSO AT THIS TIME -- IN CASE YOUR HONOR WAS GOING TO SET A DATE IN TERMS OF SURRENDER, WE HAVE PREPARED A MOTION FOR A STAY OF THE EXECUTION OF THE SENTENCE

PENDING THE APPEAL FROM THE DENIAL OF THE MOTIONS FOR A NEW TRIAL. AND LET ME JUST SAY THAT THAT'S A VERY BRIEF MOTION.

AS YOUR HONOR IS AWARE, YOUR HONOR'S OPINION OF 29 PAGES CONCERNING THOSE MOTIONS GOES INTO SOME DETAIL NOT ONLY IN THE RECORD, I THINK, OF THIS CASE, BUT RAISES AN IMPORTANT LEGAL QUESTION, WHICH IS THE EXTENT TO WHICH AN INDIVIDUAL CONGRESSMAN IS ABLE TO WAIVE THE SPEECH AND DEBATE PRIVILEGE PROVIDED BY THE CONSTITUTION. AS I UNDERSTAND YOUR HONOR'S OPINION, IT ESSENTIALLY SAYS THAT AS TO THOSE MATTERS WHICH WE HAVE RAISED AND THAT WERE AVAILABLE TO US, ONLY, WE SAY, AFTER THE TRIAL IN THIS CASE, THAT THOSE WERE AVAILABLE TO MR. HANSEN AND THAT HE COULD HAVE OBTAINED THEM DURING THE TRIAL AND THAT, CONSEQUENTLY, THEY ARE NOT NEWLY DISCOVERED EVIDENCE.

OUR VIEW HAS BEEN, AND YOUR HONOR IS AWARE, THAT AT THE TIME OF THE TRIAL A MOTION BASED ON SPEECH AND DEBATE WAS MADE BY THE CLERK OF THE HOUSE. WE DID NOT TAKE A POSITION ONE WAY OR THE OTHER. IN FACT, I THINK ONE OF YOUR HONOR'S BASES FOR RULING WAS THAT WE SHOULD BE ENTITLED TO CROSS-EXAMINE IF IN FACT THESE MATTERS WERE BEING BROUGHT OUT BY THE GOVERNMENT. SO, I THINK YOUR HONOR WAS AWARE AT THE TIME THAT IT WAS NOT SIMPLY THE AVAILABILITY OF EVERY CONGRESSMAN TO GO IN AND TO WAIVE MATTERS PERTAINING TO THE SPEECH AND DEBATE PRIVILEGE. AND THAT ISSUE HAS BEEN RAISED BY YOUR HONOR'S RULING ON THE MOTION FOR A NEW TRIAL. IT'S A SUBSTANTIAL LEGAL QUESTION. I THINK THE FACTUAL ISSUES THEMSELVES WOULD WARRANT AN APPEAL.

BUT CERTAINLY THAT LEGAL ISSUE IS ONE THAT'S DESERVING OF SERIOUS CONSIDERATION BY THE COURT OF APPEALS.

GIVEN THAT THE SENTENCE IS A SENTENCE IN TERMS OF MONTHS, AND GIVEN THAT, AS YOUR HONOR IS AWARE, APPEALS DO TAKE A MATTER OF MONTHS, THERE IS A POSSIBILITY, IF YOUR HONOR WERE NOT TO STAY THE SENTENCE, THAT THE SENTENCE WOULD BE SERVED BY THE TIME THE APPEAL IS REALLY PROCESSED THROUGH THE COURT OF APPEALS. SO, FOR THAT REASON, WE REQUEST THAT THE EXECUTION OF SENTENCE BE STAYED PENDING A PROMPT AND EXPEDITIOUS APPEAL. AND WE WOULD BE PREPARED TO DISCUSS WITH THE GOVERNMENT, WITH APPELLATE COUNSEL, THE SUBMISSION OF VERY EXPEDITED BRIEFS SO THAT THIS MATTER COULD BE CONSIDERED PROMPTLY BY THE COURT OF APPEALS.

THE COURT: MR. WEINGARTEN, WOULD YOU BE IN A POSITION TO TAKE A STAND ON THIS MOTION FOR STAY OF EXECUTION OF SENTENCE WHICH HAS JUST BEEN HANDED TO THE COURT SO WE CAN RULE UPON THAT PROMPTLY?

MR. WEINGARTEN: YES, YOUR HONOR, I WOULD. WE WOULD RESPECTFULLY OBJECT. I AGREE ENTIRELY WITH MR. HANSEN THAT HE HAS A BRILLIANT LAWYER, AND I'M RELUCTANT TO CALL ANY MOTION FILED BY MR. LEWIN FRIVOLOUS, BUT IN ALL DUE RESPECT, WE DO NOT BELIEVE THE AFTER-DISCOVERED EVIDENCE ISSUE IS A SERIOUS ONE. I THINK THEY FAIL TO MEET ANY OF THE PRONGS, BASICALLY, OF THE AFTER-DISCOVERED EVIDENCE TEST. EVEN IF THE ISSUE RAISED BY MR. LEWIN NOW ABOUT WHETHER OR NOT HE CAN WAIVE SPEECH AND DEBATE IS

A SERIOUS ISSUE. THE MOTION FALLS FOR OTHER REASONS.

I MEAN IT JUST -- WE SEE NO POSSIBILITY WHATEVER OF SUCCESS FOR THE DEFENDANT ON THIS MOTION. AND WE THINK THE SENTENCE SHOULD START AND THE DEFENDANT SHOULD NOT GET A STAY ON THESE MOTIONS BY THIS COURT.

THE COURT: I WILL GRANT THE MOTION FOR STAY OF THE SENTENCE UNDER THE CIRCUMSTANCES, ALTHOUGH MUCH OF WHAT THE GOVERNMENT HAS JUST SAID CERTAINLY IS CORRECT. THE STAY SHALL BE WITH THE SAME PROVISOS THAT WERE APPLICABLE TO MR. HANSEN AT THE TIME WE TALKED ABOUT THIS TWO YEARS AND ONE DAY AGO, AND THAT IS: THAT YOU ARE TO CONTACT YOUR PROBATION OFFICER, MR. HUNT, WHO IS SEATED AT THE TABLE YONDER, OR HIS SUCCESSOR, NO LESS FREQUENTLY THAN ONE TIME PER MONTH, AND THAT IT SHOULD BE ON I BELIEVE IT IS THE FIRST MONDAY OF EACH MONTH, BUT WHATEVER THE RULING WAS IN THAT REGARD, TO ADVISE OF YOUR ACTIVITIES. THAT ADVICE CAN BE GENERATED TELEPHONICALLY. IT IS ONLY WHEN THE PROBATION OFFICER FEELS THAT IT IS IMPORTANT, FOR WHATEVER REASON HE DEEMS IN HIS SOLE DISCRETION IT IS IMPORTANT TO SEE YOU, THAT YOU WILL THEN BE REQUIRED TO PURSUE AND SEE HIM.

OBVIOUSLY, ALL OF THE OTHER CONDITIONS PENDING SENTENCE PERTAIN, SUCH AS NOT TO GET ARRESTED FOR ANY OTHER OFFENSE AND THE CUSTOMARY.

ALL RIGHT. GOOD DAY.

MR. BRAGA: THANK YOU, YOUR HONOR

(WHEREUPON, AT 11:25 A.M., THE ABOVE-ENTITLED MATTER

WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I HEREBY CERTIFY THAT THE FOREGOING IS THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER AND THAT IT IS COMPLETE AND ACCURATE, TO THE BEST OF MY KNOWLEDGE AND ABILITY.

Gordon A. Slodysko
GORDON A. SLODYSKO
OFFICIAL COURT REPORTER

WILLIAM V. ROTH, JR., DELAWARE, CHAIRMAN

TED STEVENS, ALASKA
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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510

March 28, 1986

The Honorable Edwin Meese III
Attorney General
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20530

Dear Attorney General Meese:

On March 21, Senator Hatch and Senator Cranston introduced S. 2214, a bill proposing that civil penalties be the exclusive sanctions for knowing and willful violations of the financial disclosure requirements of the Ethics in Government Act of 1978. The provisions of this legislation would apply to reports filed by officials of all three branches of the Federal government and would be retroactive to the date of the enactment of the Ethics in Government Act. I am enclosing a copy of S. 2214 for your consideration.

The Subcommittee on Oversight of Government Management, to which S. 2214 has been referred, is considering holding a hearing on this legislation next month. Accordingly, I ask that the Department of Justice provide the Subcommittee with its official views regarding this legislation.

I would appreciate your providing me with the Department's comments on S. 2214 by Friday, April 18. If you have any questions concerning this matter, please have your staff contact Mary Gerwin or Susan Collins of the Subcommitee staff at 224-5538.

Thank you for your consideration of this request.

With best wishes, I am

Sincerely,

Bill Cohen

William S. Cohen
Chairman

WSC:mbg

Enclosure

CON 132-84-0
March 1986

WILLIAM V. ROTH, JR., DELAWARE, CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510

May 29, 1986

The Honorable Edwin Meese III
The Attorney General
U.S. Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

On March 28, I wrote to you requesting that you provide me with the official views of the Department of Justice on S. 2214, a bill proposing that civil penalties be the exclusive sanctions for knowing and willfull violations of the financial disclosure requirements of the Ethics in Government Act of 1978. Although I had asked that this information be provided to me by April 18, I have not yet received a reply to my letter, a copy of which is enclosed.

As our staffs have discussed, the hearing that the Subcommittee had scheduled on April 29 to consider S. 2214 was postponed in order to accommodate the Department of Justice's witness, who was scheduled to testify before the Senate Judiciary Committee on the same day. Thus, while I realize that the Department was preparing testimony on S. 2214 in lieu of responding to my earlier request for comments, I ask that the Department provide me with its comments in anticipation of the Subcommittee's rescheduling its hearing on this bill. I ask that you provide me with this information by Friday, June 9.

Thank you for your consideration of this matter. If you have any questions concerning this matter, please have your staff contact Mary Gerwin or Susan Collins of the Subcommittee staff at 224-5538.

With best wishes, I am

Sincerely,

Bill Cohen

William S. Cohen
Chairman

WSC:mbg
Enclosure

Executive Order 11222

PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

SECTION 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

SECTION 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

SEC. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

SEC. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

SEC. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

SEC. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

SEC. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

PART III—STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

SECTION 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

SEC. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

SEC. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

SEC. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

SEC. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

SEC. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

SECTION 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

Sec. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

Sec. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

Sec. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

Sec. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

Sec. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

SECTION 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

SEC. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

SEC. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

SEC. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

SEC. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

(a) The head of any department or agency in the Executive Branch;

(b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and

(c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

SECTION 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

SEC. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

SECTION 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

SEC. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

SEC. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

SEC. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

SEC. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

PART 735—EMPLOYEE RESPONSIBILITIES AND CONDUCT

NOTE: Part 1001 added to this chapter, 31 FR 873, January 22, 1966 and revised 32 FR 11113, Aug. 1, 1967 and 36 FR 6874, Apr. 9, 1971, supplements this Part 735.

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AUTHORITY: Secs. 602, 701, 702; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306, unless otherwise noted, 18 U.S.C. 201 note.

SOURCE: 33 FR 12487, Sept. 4, 1968, unless otherwise noted.

Subpart A—General Provisions

§ 735.101 Purpose.

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards. To accord with these concepts, this part sets forth OPM regulations under which each agency head shall issue regulations covering the agency's employees and special Government employees, prescribing standards of conduct and responsibilities, and governing statements reporting employment and financial interests.

§ 735.102 Definitions.

In this part:

(a) "Agency" means an Executive agency (other than the General Accounting Office) as defined by section 105 of title 5, United States Code, the Postal Service, and the Postal Rate Commission.

(b) "Employee" means an employee of an agency, but does not include a special Government employee or a member of the uniformed services.

(c) "Executive order" means Executive Order 11222 of May 8, 1965.

(d) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(e) "Special Government employee" means a "special Government employee" as defined in section 202 of title 18, United States Code, who is employed in the executive branch, but does not include a member of the uniformed services.

(f) "Uniformed services" has the meaning given that term by section 2101 of title 5, United States Code.

[33 FR 12487, Sept. 4, 1968, as amended at 36 FR 11999, June 24, 1971]

§ 735.103 Applicability to members of the uniformed services.

This part, except this section, is not applicable to members of the uniformed services. Each agency having jurisdiction over members of the uniformed services shall issue regulations covering those members and regulating their ethical and other conduct and the reporting of employment and financial interests in a manner consistent with the Executive order and this part.

§ 735.104 Issuance, approval, and publication of agency regulations.

(a) Except as provided in paragraph (f) of this section, each agency head shall prepare, and submit to OPM for approval, regulations in accordance with this part that:

(1) Implement the requirements of law, the Executive order, and this part; and

(2) Prescribe additional standards of ethical and other conduct and reporting requirements that are appropriate to the particular functions and activities of the agency and are not inconsistent with law, the Executive order, and this part.

(b) After OPM approval each agency head shall:

(1) Submit the agency's regulations to the FEDERAL REGISTER for publication;

(2) Furnish each employee and special Government employee a copy of the appropriate agency regulations (or a comprehensive summary thereof) within 90 days after approval;

(3) Furnish each new employee and special Government employee a copy of the appropriate agency regulations (or a comprehensive summary thereof) at the time of his entrance on duty;

(4) Bring the appropriate agency regulations to the attention of each employee and special Government employee annually, and at such other times as circumstances warrant;

(5) Assure the availability of counseling to each employee and special Government employee as provided in § 735.105; and

(6) Have available for review by employees and special Government employees, as appropriate, copies of laws, the Executive order, agency regulations, and pertinent OPM regulations and instructions relating to ethical and other conduct.

(c) Agency regulations issued under this part are effective only after approval by OPM and publication in the FEDERAL REGISTER.

(d) Requests for approval of agency regulations to be issued under this part shall be directed to the Office of Personnel Management, Office of the General Counsel, Washington, D.C. 20415.

(e) This section applies to any amendment of agency regulations issued under this part.

(f) An agency head who does not consider it feasible to prepare agency regulations under this part because of the small number of his employees, or for another reason acceptable to OPM, may adopt the regulations in this part for application, as appropriate, to the employees and special Government employees of his agency if:

(1) He obtains the approval of OPM for that adoption; and

(2) After obtaining that approval, he submits a notice to the FEDERAL REGISTER announcing the applicability of this part to his employees.

§ 735.105 Interpretation and advisory service.

(a) Each agency head shall designate a top-ranking employee of his agency who has appropriate experience, preferably legal, and in whom he has complete personal confidence, to be the counselor for the agency and to serve as the agency's designee to OPM on matters covered by this part. The counselor shall be made responsible for coordination of the agency's counseling services provided under paragraph (b) of this section and for assuring that counseling and interpretations on questions of conflicts of interest and other matters covered by this part are available to deputy counselors designated under paragraph (b) of this section.

(b) Each agency head shall designate deputy counselors for the agency's employees and special Government employees. Deputy counselors designated under this section shall be qualified and in a position to give authoritative advice and guidance to each employee and special Government employee who seeks advice and guidance on questions of conflicts of interest and on other matters covered by this part.

(c) Each agency shall notify its employees and special Government employees of the availability of counseling services and of how and where these services are available. This notification shall be made within 90 days after approval of the agency regulations to be issued under this part, and periodically thereafter. In the case of a new employee or special Government employee appointed after this notification, notification shall be made at the time of his entrance on duty.

§ 735.106 Reviewing statements and reporting conflicts of interest.

(a) Agency regulations issued under this part shall establish a system for the review of statements of employment and financial interests submitted under Subpart D of this part. The system of review shall be designed to disclose conflicts of interest or apparent conflicts of interest on the part of employees and special Government employees.

(b) The system of review established under paragraph (a) of this section shall provide that, when a statement submitted under Subpart D of this part or information from other sources indicates a conflict between the interests of an employee or special Government employee and the performance of his services for the Government and when the conflict or appearance of conflict is not resolved at a lower level in the agency, the information concerning the conflict or appearance of conflict shall be reported to the agency head through the counselor for the agency.

(c) The employee or special Government employee concerned shall be provided an opportunity to explain the conflict or appearance of conflict.

§ 735.107 Disciplinary and other remedial action.

(a) Agency regulations issued under this part shall provide that a violation of the agency regulations by an employee or special Government employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) When, after consideration of the explanation of the employee or special Government employee provided by § 735.106, the agency head decides that remedial action is required, he shall take immediate action to end the conflicts or appearance of conflicts of interest. Remedial action may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee or special Government employee of his conflicting interest;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive orders, and regulations.

Subpart B—Agency Regulations Governing Ethical and Other Conduct and Responsibilities of Employees

§ 735.201 Specific provisions of agency regulations.

Agency regulations issued under this subpart, as a minimum, shall contain provisions covering the standards of and governing the ethical and other conduct of its employees set forth in §§ 735.202 through 735.210.

§ 735.201a Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 735.202 Gifts, entertainment, and favors.

(a) Except as provided in paragraphs (b) and (f) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;

(2) Conducts operations or activities that are regulated by his agency; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency regulations implementing paragraph (a) of this section may provide for such exceptions as may be necessary and appropriate in view of the nature of the agency's work and the duties and responsibilities of the employees. Appropriate exceptions which may be made by an agency include, but are not limited to, those that:

(1) Govern obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors;

(2) Permit acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance;

(3) Permit acceptance of loans from banks or other financial institutions on customary terms of finance proper and usual activities of employees, such as home mortgage loans; and

(4) Permit acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(c) [Reserved]

(d) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(e) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in section 7342 of title 5, United States Code.

(f) Neither this section nor § 735.203 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967 (46 Comp. Gen. 689).

§ 735.203 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair his mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive order, this part, or the agency regulations. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of OPM or Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the agency head gives written authorization for use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of the order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information.

(d) [Reserved]

(e) This section does not preclude an employee from:

(1) [Reserved]

(2) Participation in the activities of national or State political parties not proscribed by law.

(3) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

(4) Outside employment permitted under the regulations of his agency issued under this part.

§ 735.204 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, the Executive order, this section, or the agency regulations.

§ 735.205 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 735.206 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 735.203(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

§ 735.207 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court or one imposed by law such as Federal, State or local taxes, and "in a proper and timely manner" means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt.

[40 FR 7435, Feb. 20, 1975]

§ 735.208 Gambling, betting, and lotteries.

An employee shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities:

(a) Necessitated by an employee's law enforcement duties; or

(b) Under section 3 of Executive Order 10927 and similar agency-approved activities.

§ 735.209 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 735.210 Miscellaneous statutory provisions.

Each employee shall acquaint himself with each statute that relates to his ethical and other conduct as an employee of his agency and of the Government. An agency shall direct the attention of its employees, by specific reference in the agency regulations issued under this part, to each statute relating to the ethical and other conduct of employees of that agency and to the following statutory provisions:

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72A Stat. B12, the "Code of Ethics for Government Service".

(b) Chapter 11 of title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibitions against political activities in subchapter III of chapter 73 of title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

Subpart C—Agency Regulations Governing Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 735.301 Specific provisions of agency regulations.

Agency regulations issued under this subpart, as a minimum, shall contain provisions covering the standards of and governing the ethical and other conduct of its special Government employees as set forth in §§ 735.302 through 735.306. In addition, to the extent considered appropriate by the agency head, the agency regulations issued under this subpart shall require its special Government employees to adhere to the standards of conduct made applicable to employees by the agency regulations issued under Subpart B of this part.

§ 735.302 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 735.303 Use of inside information.

(a) A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

(b) Agency regulations implementing paragraph (a) of this section may provide that special Government employees may teach, lecture, or write in a manner not inconsistent with § 735.203(c) in regard to employees.

§ 735.304 Coercion.

A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 735.305 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, a special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with his agency anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) Agency regulations implementing paragraph (a) of this section may provide for exceptions for special Government employees that are not inconsistent with the exceptions authorized for their employees under § 735.202(b).

§ 735.306 Miscellaneous statutory provisions.

Each special Government employee shall acquaint himself with each statute that relates to his ethical and other conduct as a special Government employee of his agency and of the Government. An agency shall direct the attention of its special Government employees, by specific reference in the agency regulations issued under this part, to each statute relating to the ethical and other conduct of special Government employees of that agency and to those statutory provisions listed in § 735.210 that are applicable to special Government employees.

Subpart D—Agency Regulations Governing Statements of Employment and Financial Interests

§ 735.401 Form and content of statements.

The statements of employment and financial interests required under this subpart for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by OPM in the Federal Personnel Manual. An agency shall not include questions on a statement of employment and financial interests that go beyond, or are in greater detail than, those included on OPM's formats without the approval of OPM.

§ 735.402 Specific provisions of agency regulations for employees.

Agency regulations issued under this subpart for employees, as a minimum, shall contain provisions covering the reporting requirements set forth in §§ 735.403 through 735.411.

§ 735.403 Employees required to submit statements.

Except as provided in § 735.404, each agency head shall require statements of employment and financial interests from:

(a) Employees paid at a level of the Executive Schedule in subchapter II of chapter 53 of title 5, United States Code.

(b) Employees classified at GS-13 or above under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions identified in the agency's regulations as positions the incumbents of which are responsible for making a Government decision or taking a Government action in regard to:

(1) Contracting or procurement;

(2) Administering or monitoring grants or subsidies;

(3) Regulating or auditing private or other non-Federal enterprise; or

(4) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

(c) Employees classified at GS-13 or above under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions which the agency has determined have duties and responsibilities which require the incumbent to report employment and financial interests in order to avoid involvement in a possible conflicts-of-interest situation and carry out the purpose of law, Executive order, this part, and the agency's regulations.

(d) Employees classified below GS-13 under section 5332 of title 5, United States Code, or at a comparable pay level under another authority, who are in positions which otherwise meet the criteria in paragraph (b) or (c) of this section, when the inclusion of the positions in the agency's regulations has been specifically justified by the agency in writing to OPM as an exception that is essential to protect the integrity of the Government and avoid employee involvement in a possible conflicts-of-interest situation.

§ 735.403a Employee's complaint on filing requirement.

Agency regulations issued under this subpart shall inform employees of the opportunity for review through the agency's grievance procedure of a complaint by an employee that his position has been improperly included under the regulations of his agency as one requiring the submission of a statement of employment and financial interests.

§ 735.404 Employees not required to submit statements.

(a) Employees in positions that meet the criteria in paragraph (b) of § 735.403 may be excluded from the reporting requirement when the agency determines that:

(1) The duties of a position are such that the likelihood of the incumbent's involvement in a conflicts-of-interest situation is remote;

(2) The duties of a position are at such a level of responsibility that the submission of a statement of employment and financial interests is not necessary because of the degree of supervision and review over the incumbent or the inconsequential effect on the integrity of the Government; or

(3) The use of an existing or alternative procedure approved by OPM is adequate to prevent possible conflicts of interest.

(b) A statement of employment and financial interests is not required by this subpart from an agency head, a Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that office, or a full-time member of a committee, board, or commission appointed by the President. These employees are subject to separate reporting requirements under section 401 of the Executive order.

§ 735.404a Interests not required to be reported.

Agency regulations issued under this subpart may exclude the reporting of any interest which has, by general rule or regulation published in the Federal Register under section 208(b)(2) of title 18, United States Code, been exempted as too remote or too inconsequential to affect the integrity of employees' services.

§ 735.405 Time and place for submission of employees' statements.

An employee required to submit a statement of employment and financial interests under the regulations of his agency shall submit that statement to the office designated in the agency regulations not later than:

(a) Ninety days after the effective date of the agency regulations issued under this part if employed on or before that effective date; or

(b) Thirty days after his entrance on duty, but not earlier than ninety days after the effective date, if appointed after that effective date.

§ 735.406 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year, except when OPM authorizes a different date on a showing by an agency of necessity therefor. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of title 18, United States Code, or Subpart B of this part.

§ 735.407 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

§ 735.408 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

§ 735.409 Information not required.

This subpart does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

[33 FR 12487, Sept. 4, 1968, as amended at 40 FR 48339, Oct. 15, 1975]

§ 735.410 Confidentiality of employees' statements.

An agency shall hold each statement of employment and financial interests, and each supplementary statement, in confidence. To insure this confidentiality, an agency shall designate which employees are authorized to review and retain the statements. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. An agency may not disclose information from a statement except as OPM or the agency head may determine for good cause shown.

§ 735.411 Effect of employees' statements on other requirements.

The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

§ 735.412 Specific provisions of agency regulations for special Government employees.

(a) Agency regulations issued under this subpart for special Government employees, as a minimum, shall contain provisions covering the reporting requirements set forth in this section.

(b) Except as provided in paragraph (c) of this section, each agency head shall require each special Government employee to submit a statement of employment and financial interests which reports:

(1) All other employment; and

(2) The financial interests of the special Government employee which the agency determines are relevant in the light of the duties he is to perform.

(c) An agency head may waive the requirement in paragraph (b) of this section for the submission of a statement of employment and financial interests in the case of a special Government employee who is not a consultant or an expert when the agency finds that the duties of the position held by that special Government employee are of a nature and at such a level of responsibility that the submission of the statement by the incumbent is not necessary to protect the integrity of the Government. For the purpose of this paragraph, "consultant" and "expert" have the meanings given those terms by Chapter 304 of the Federal Personnel Manual, but do not include:

(1) A physician, dentist, or allied medical specialist whose services are procured to provide care and service to patients; or

(2) A veterinarian whose services are procured to provide care and service to animals.

(3) A specialist appointed for intermittent confidential intelligence consultation of brief duration.

(d) A statement of employment and financial interest required to be submitted under this section shall be submitted not later than the time of employment of the special Government employee as provided in the agency-regulations. Each special Government employee shall keep his statement current throughout his employment with the agency by the submission of supplementary statements.

[33 FR 12487, Sept. 4, 1968, as amended at 34 FR 6515, Apr. 16, 1969]

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510

March 24, 1986

The Honorable David Martin
Director
Office of Government Ethics
1717 H Street, N.W.
Washington, D.C.

Dear Mr. Martin:

On March 21, Senator Hatch and Senator Cranston introduced S. 2214, a bill proposing that civil penalties be the exclusive sanctions for knowing and willful violations of the financial disclosure requirements of the Ethics in Government Act of 1978. The provisions of this legislation would apply to reports filed by officials of all three branches of the Federal government and would be retroactive to the date of the enactment of the Ethics in Government Act. I am enclosing a copy of S. 2214 for your consideration.

The Subcommittee on Oversight of Government Management, to which S. 2214 has been referred, is considering holding a hearing on this legislation next month. In light of the central role that the Office of Government Ethics performs in administering the financial disclosure system for the Executive Branch, it would be most useful to the Subcommittee to learn your views on S. 2214, particularly with regard to the effects that this proposal may have on compliance with the financial disclosure reporting requirements.

I would appreciate your providing me with your comments regarding this legislation by Friday, April 11. If you have any questions concerning this matter, please have your staff contact Mary Gerwin or Susan Collins of the Subcommitee staff at 224-5538.

Thank you for your consideration of this request.

With best wishes, I am

Sincerely,

Bill Cohen

William S. Cohen
Chairman

WSC:mbg

United States of America
**Office of
Government Ethics**

Office of Personnel Management
P.O. Box 14108
Washington, D.C. 20044

APR 1 4 1986

Honorable William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

APR 1 4 1986

Dear Mr. Chairman:

Thank you for your March 24, 1986 letter requesting our comments on S. 2214, a bill proposing that civil penalties be the exclusive sanction for knowing and willful violations of the financial disclosure requirements of the Ethics in Government Act of 1978.

As you know, this Office has normally taken a position that would favor the use of administrative remedies in lieu of stricter criminal penalties when dealing with enforcement issues involving conflict of interest matters. Consequently, we favor the less restrictive civil approach when dealing with noncompliance problems under the Ethics in Government Act. However, in the case of section 204 of the Act, we think that there is a distinction between failing to file (noncompliance) and intentionally filing a false report.

Our experience is that a failure to file public financial disclosure reports usually involves "termination reports." The provisions of section 201(e) of the Act require that such reports be filed on or before the thirtieth day after termination of federal employment. It seems that some individuals are reluctant to file once they terminate federal service. Generally, this reluctance to file is overcome by a letter from this Office or the parent agency pointing out the civil penalties for failure to file.

In the case of intentional false filing, however, we are of the opinion that a more stringent approach is in order. While we do not believe that criminal penalties are appropriate in every case of intentional false filing, we think that they should be available. The provisions of 18 U.S.C. § 1001 and 5 U.S.C. § 204 complement each other, and, more importantly, they both complement the entire range of criminal conflict of interest provisions contained in chapter 11 of title 18, United States Code. For example, it is not unusual to use the false statement provisions of 18 U.S.C. § 1001 when prosecutorial discretion rules out the use of 18 U.S.C. § 208(a) in matters involving official acts which may redound to an individual personal financial interest.

The legislative history of the Ethics in Government Act seems to make clear that "mere inadvertence" should not be the basis for pursuing a matter criminally when dealing with public financial reporting. However, when intentional false reporting is involved, the legislative history reveals no unequivocal intent that criminal penalties should not apply.

Please let me know if I may be of further assistance as you deliberate this matter.

Sincerely,

David H. Martin
Director

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 25, 1986

TO : Senate Governmental Affairs Committee
Oversight of Government Management Subcommittee
Attn: Mary Gerwin

FROM : American Law Division

SUBJECT : Effect of Repeal of Criminal Penalties for False Financial Disclosure Reports

This memorandum is submitted in response to the Committee request as discussed with Mary Gerwin for brief information on the effect of a legislative "repeal" of the application of criminal penalties for filing false financial disclosure reports under the Ethics in Government Act of 1978. The Ethics in Government Act of 1978 does not expressly provide for criminal penalties for failing to file or falsely filing a financial disclosure report required under the Act. However, the general federal false statement and fraud statute, 18 U.S.C. § 1001, generally prohibits the making of false, fictitious or fraudulent statements to the United States, or any agency of the United States, concerning matters within its jurisdiction. The United States Court of Appeals found that Congress did not clearly and expressly repeal the application of 18 U.S.C. § 1001 to the disclosure reports in the Ethics in Government Act, and thus upheld the conviction of a former Member of Congress for such false filings under 18 U.S.C. § 1001. *United States* v. *Hansen,* 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 1262 (1986).

It has been a general rule of common law recognized by the courts of the United States that "the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them." *Bradley* v. *United States*, 410 U.S. 605, 607 (1973); *Bell* v. *Maryland*, 378 U.S. 226, 230 (1964); *Hamm* v. *Rock Hill*, 379 U.S. 306, 312 (1964); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1870). The prosecution of any case, including a conviction which is then pending appeal at the time the criminal penalties of a statute are repealed, absent a "saving" provision, would therefore abate under common law. *United States* v. *Reisinger*, 128 U.S. 398, 401-402 (1888); *United States* v. *Chambers*, 291 U.S. 217, 223-224 (1934).

It should be noted however, that under federal law a general "savings" provision exists, at 1 U.S.C. § 109, which works to reverse the general common law rule of abatement for federal legislation. See *United States* v. *Jackson*, 468 F.2d 1388 (8th Cir. 1972), *cert denied*, 410 U.S. 935. This saving statute states that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." This saving provision, since it "is in derogation of the common law rights of persons accused of a crime," is strictly construed. *United States* v. *Hark*, 49 F.Supp. 95, 97 (D. Mass. 1943), *reversed on other grounds*, 320 U.S. 531, *rehrg den.* 321 U.S. 802; see also *United States* v. *Auerbach*, 68 F. Supp. 776 (D. Cal. 1946). The "saving" provision has thus been found *not* to prevent abatement of prosecutions of cases where a regulation, rather than a statute, has been repealed (*United States* v. *Hark*, *supra*), or where a constitutional amendment, rather than a statute, has been repealed (*United States* v. *Chambers*, *supra* at 223-224), or where more than a mere "technical abatement" might occur, such as where Congress "substitutes a right for a crime" (Hamm v. Rock Hill, supra at 314).

Generally then, a repeal of a criminal statute by Congress will not abate incomplete prosecutions under the former law, unless the repealing act expressly indicates Congress' intent for such a result. The common law abatement of prosecutions has applied in any event only to those cases in which a "final disposition" has not been rendered by the "highest court" authorized to review such prosecution. Bradley v. United States, supra. In the case of Massey v. United States, 291 U.S. 608 (1934), the Supreme Court found that a conviction under the National Prohibition Act, which was affirmed by the Circuit Court of Appeals which had stayed its mandate pending a petition to the Supreme Court for a writ of certiorari, when such petition for writ was filed, was not a "final judgment" against the petitioner prior to the repeal of the 21st Amendment, and therefore the prosecution would abate. 291 U.S. at 610.

It would not appear therefore that abatement would apply under common law for "final" convictions. There may be questions raised, however, as to the effect of a law where Congress expressly indicates by statute that the repeal of the criminal law or the repeal of criminal penalties is to be applied retroactively, and expressly is to apply to even final convictions properly obtained under the former law. Initial research has uncovered no specific federal statutory precedents for the repeal of criminal penalties in a law and the retroactive application of such repeal to persons finally and properly convicted under the former provisions of law. Such a retroactive application of a criminal repeal would arguably be in the nature of a "legislative pardon" or a legislative "amnesty." As opposed to many abatement cases the questions raised by such a provision would apparently not be of congressional intent as to the applicability of the law, if such intent were clearly expressed, but rather ones of congressional power and authority to legislate such a "pardon," "amnesty" or "release" of convicts.

There is no express provision in the Constitution which states that Congress may or may not adopt legislation which applies the repeal of criminal penalties retroactively to persons finally convicted under the former law. Although the general maxim is often expressed that retroactive applications of laws are not favored, this is generally based on considerations of vested private rights of individuals, the freedom of contracts, and general due process considerations,[1] (_Chase Sec. Corp._ v. _Donaldson_, 325 U.S. 304 (1945); _Home Building and Loan Ass'n_ v. _Blaisdell_, 290 U.S. 398 (1934); _FHA_ v. _The Darlington, Inc._, 358 U.S. 84 (1958)), which may not be particularly relevant to the elimination of a criminal penalty and its applicability retroactively to past conduct.[2] Remissions of statutory penalties and fines by the legislature have generally not been considered improper retroactive laws, as they generally do not affect private rights in an impermissible manner. _Maryland_ v. _B. & O. Railroad_, 44 U.S. 534 (1845); _United States_ v. _Morriss_, 10 Wheat. (23 U.S.) 246 (1825).

The increase of a criminal penalty or the legislative establishment, rather than abolition, of a crime, and its attempted retroactive application to past conduct, would incur the specific constitutional prohibition on _ex post facto_ criminal laws. _United States Constitution_, Art. I, Sec. 9, cl. 3. See _Weaver_ v.

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[1] "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 _Harvard Law Review_ 692 (1960).

[2] See "Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation," 121 _U. Penn. Law Rev._ 120 (1972).

Graham, 450 U.S. 24 (1981). A retroactive law which does not increase the punishment or "disadvantage the offender," would not, however, constitute an ex post facto law. Weaver v. Graham, supra at 29. The elimination of criminal penalties retroactively, and acts in the nature of legislative pardons, although not covered by the ex post facto provision or any other specific constitutional provision, may be questioned under the general theory of "separation of powers," since the power to pardon is expressly an Article II, executive power. United States Constitution, Art. II, Section 2, cl. 1; See United States v. Klein, 80 U.S. 128 (1872). It may be noted that the ex post facto provision of the Constitution was noted by the Supreme Court as also bearing on separation of powers: "The ex post facto prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." Weaver v. Graham, supra at 29, n. 10.

Under the separation of powers doctrine, it might be argued that the power to pardon is vested exclusively in the President, and may not be exercised or interfered with by another branch of government. See discussion generally of separation of powers doctrine in Buckley v. Valeo, 424 U.S. 1, 120-124 (1976); INS v. Chadha, 462 U.S. 919, 944-967 (1983), note United States v. Klein, 80 U.S. 128 (1872). In a case concerning state legislation, In re Kline, 70 N.E. 511 (1904), the state court there found that a repeal of a criminal statute could not affect the release of a prisoner finally and properly convicted under that former statute, since it would violate the separation of powers doctrine as both an unwarranted legislative interference with the judicial process, as well as a potential legislative infringement on the executive pardon power:

> The relator demurs to the answer, and insists that, the "habitual criminal act"

> having been repealed, there is no longer any warrant for detaining him under his sentence as an habitual criminal, his sentence for burglary and larceny having expired. The relator was legally tried, convicted, sentenced, and committed under a valid statute. *Blackburn* v. *State*, 50 Ohio St. 428 36 N.E. 18. Not only is the case res adjudicata, and beyond the reach of the courts, but it is in process of execution as a final judgment. If the courts could resume jurisdiction, and interfere with the execution of sentence, after regular procedure, judgment, and commitment under sentence, there could be no final judgment, and no end to a legal controversy. *The Legislature cannot intervene and vacate the judgment of the courts, either directly or indirectly, by repeal of a statute under which the judgment was rendered because that would be an exercise of judicial, and not of legislative, power.* 1 Black on Judgments, § 298. *"Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts."* Cooley on Constitutional Limitations (7th Ed.) 136. The only remedy left to the adjudged criminal, if the case calls for any remedy, is a resort to the pardoning power, which is vested in the executive. The repeal of a statute which authorizes a prosecution and conviction, if before final judgment, ends all proceedings under it, unless a contrary intent appears in the repealing statute; but a repeal after final judgment will neither vacate the judgment nor arrest the execution of the sentence. This view of the law is fully sustained by the authorities cited by the counsel for the respondent, and after diligent search we have not been able to find any to the contrary.

70 N.E. at 512. Emphasis added.

In the case of United States v. Klein, 80 U.S. 128 (1872), concerning legislation which purported to authorize and condition a civil war pardon and amnesty by the President, the Supreme Court found that the Congress may not place conditions on the President's pardon power, under the separation of powers doctrine, since that pardon power is reserved to the President by the Constitution:

> It is the intention of the Constitution that each of the great co-ordinate departments of the government - the Legislative, the Executive, and the Judicial - shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions . . . .
>
> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.
>
> 80 U.S. at 147-148.

Some commentators have noted that although the Congress does not possess express pardoning power under the Constitution, that is, to pardon specified individuals, or to interfere with or limit the President's powers, it might still legitimately exercise an "amnesty" power itself by legislating a general amnesty provision, or a law which works to provide the release or protection from criminal liability to all those that fall within a particular class.[3/] In the case of Brown v. Walker, 161 U.S. 591 (1896), the Supreme

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3/ "Congressional Amnesty for War Resisters: Policy Consideration and Constitutional Problems," 25 Vanderbilt Law Rev. 525 (1972).

Court found that a legislative grant of immunity for prosecution, an action described by the Court as "virtually an act of general amnesty," was not violative of the separation of powers doctrine as in conflict with the President's pardon power:

> The act of Congress in question . . . is virtually an act of general amnesty, and belongs to a class of general legislation which is not uncommon either in England . . . or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty . . . .
>
> * * *
>
> The distinction between amnesty and pardon is of no practical importance. It is said in Knote v. United States, 95 U.S. 149, 152, "the Constitution does not use the word 'amnesty', and except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted.
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> 161 U.S. at 601-602. Emphasis added.

In the case of The Laura, 114 U.S. 411 (1885), the Court there found that the Presidential pardon power was not exclusive, to the extent that Congress was permitted in that case to grant to an executive officer by legislation the power to remit fines and statutory penalties due the United States. The Court there emphasized the consistent practice under similar statutes: "From the adoption of the Constitution to the present moment, Congress has asserted its right, by statute, to invest the Secretary of the Treasury and other officers of the executive branch of the government with power to remit fines, penalties, and forfeitures imposed for the violation of the laws of the United States. And in none of the cases in this court or in the Circuit and District Courts of the United States . . . was it ever suggested or intimated that the legislation was an encroachment upon the President's power of pardon - so far, at least, as it invested the Secretary of the Treasury, or other officers, with the authority to remit pecuniary penalties and forfeitures." 114 U.S. at 414-415.

The issue of whether an act of Congress releasing from criminal liability one individual, or a class of individuals, *after* final conviction through the judicial process, which would work in practical effect as a legislative pardon, is violative of the separation of powers doctrine because of the express presidential pardoning power, as opposed to being a permissible general amnesty act, is therefore one which apparently has not been definitively resolved. Furthermore, the amnesty power of Congress in general is also an issue in question which has not been definitively resolved by the Supreme Court.

Jack H. Maskell

Jack H. Maskell
Legislative Attorney
American Law Division
June 25, 1986

The UNITED STATES of America

v.

George Vernon HANSEN, Defendant.

Crim. No. 83-00075.

United States District Court,
District of Columbia.

June 13, 1983.

As Amended June 17, 1983.

On United States congressman's motion to dismiss indictment in which he was charged with making false statements concerning its financial status on financial disclosure reports he was required to file with the United States House of Representatives, the District Court, Joyce Hens Green, J., held that: (1) statute providing criminal penalty for such conduct was not repealed by implication by financial disclosure provision of the Ethics in Government Act; (2) filing of financial disclosure reports under the EIGA did not constitute "legislative activity" protected by the speech or debate clause of the Constitution; and (3) congressman made no colorable showing that he was singled out for prosecution in violation of his equal protection rights.

Motion denied.

1. Fraud 🔑68.10(3)

Statute proscribing the knowing and willful falsifying of a material fact or the knowing and willful making of any false, fictitious or fraudulent statement in connection with "any matter within the jurisdiction of any department or agency of the United States" embraces false statements made to the House of Representatives. 18 U.S.C.A. § 1001.

2. Statutes 🔑159

Repeals by implication are disfavored and may be found only where there is some manifest inconsistency or positive repugnance between the two statutes.

3. Statutes 🔑223.2(1)

Where two statutes concern the same subject, a court considering them must make every effort to reconcile allegedly conflicting provisions and give effect to both, so long as doing so does not deprive one or the other of its essential meaning.

4. Criminal Law 🔑29

Where a single act violates more than one statute, the government may elect to prosecute under either.

5. Criminal Law 🔑15

Where statute providing civil remedy for certain conduct and statute providing criminal penalty for same conduct are not irreconcilable, there must be an affirmative showing of an intention to repeal before court may find the criminal provision repealed by implication.

6. Fraud 🔑68.10(1)

United States congressman charged with having made false statements concerning his financial status on disclosure reports he was required to file with the United States House of Representatives failed to make affirmative showing of intent of the Ethics in Government Act, which provided civil penalty, to repeal by implication statute imposing criminal penalty for such conduct. 18 U.S.C.A. § 1001; Ethics in Government Act of 1978, § 106, 2 U.S.C.A. § 706.

7. United States 🔑21½

Filing by Members of Congress of financial disclosure reports under the Ethics in Government Act did not constitute "legislative activity" protected by the speech or debate clause of the Constitution. U.S.C.A. Const. Art. 1, § 6, cl. 1; Ethics in Government Act of 1978, §§ 101-109, 2 U.S.C.A. §§ 701-709.

8. Criminal Law 🔑1023(3)

Congressman, who was charged with failing to file required financial disclosure reports, had right to immediate, pretrial appeal of portion of court's decision that filing of such reports was not protected by the Constitution.

9. Criminal Law 🔑31

There is a two-pronged test for establishing a prima facie case of selective prosecution: that others similarly situated were not prosecuted, i.e., there was a selection; and that decision to select defendant for prosecution was improperly motivated.

10. Constitutional Law 🔑250.1(3)

United States congressman, who was charged with making false statements concerning his financial status on financial disclosure reports he was required to file with the United States House of Representatives, made no colorable showing that he was singled out for prosecution in violation of his equal protection rights. 18 U.S.C.A. § 1001; U.S.C.A. Const.Amend. 5.

Reid H. Weingarten, James M. Cole, Public Integrity Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff.

William S. Hemsley, Jr., Frank A.S. Campbell, Roy M. Cohn, Washington, D.C., for defendant.

MEMORANDUM OPINION

JOYCE HENS GREEN, District Judge.

This matter is before the Court upon defendant's motion to dismiss the indictment in which he is charged with four counts of making false statements in documents within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. § 1001. Defendant is alleged to have made false statements concerning his financial status on the financial disclosure reports he was required to file with the United States House of Representatives in 1978, 1979, 1980, and 1981 pursuant to the Ethics in Government Act of 1978 (EIGA), 2 U.S.C. §§ 701-09. Defendant is a United States Congressman representing the second district of the State of Idaho. Defendant makes three arguments in support of his motion to dismiss: (1) that the financial disclosure requirements of EIGA are not subject to criminal sanctions under 18 U.S.C. § 1001 because Congress intended that they be enforced only by civil measures, (2) that the Speech or Debate Clause of the Constitution protects him from any prosecution concerning his EIGA reports, and (3) that he is the victim of selective prosecution. Defendant also has filed a motion for leave to take discovery relevant to the selective prosecution issue. Oral argument on these questions was heard on June 3, 1983. For the reasons which follow, defendant's motions shall be denied.

I. *The Applicability of Section 1001 to False Statements Within EIGA Reports*

[1] On its face, section 1001 proscribes the conduct allegedly committed by defendant. The section, which has general effect, essentially makes it a crime to knowingly and willfully falsify a material fact or knowingly and willfully make any false, fictitious or fraudulent statement in connection with "any matter within the jurisdiction of any department or agency of the United States."[1] This section embraces false statements made to the House of Representatives. *Diggs v. United States,* 613 F.2d 988, 999 (D.C.Cir.1979), *cert. denied,* 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 838 (1980). EIGA requires Members of the House of Representatives such as defendant to file with the Clerk of the House of Representatives annual reports of their personal financial status. 2 U.S.C. §§ 701-03. (Senators, non-voting representatives to Congress, and certain officers and employees of the Legislative Branch are also required to file such reports with the appropriate official.) Section 1001 has been held

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[1] Section 1001 provides:

"§ 1001. *Statements or entries generally*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." "[T]he term 'jurisdiction' should not be given a narrow or technical meaning for the purposes of § 1001." *Bryson v. United States,* 396 U.S. 64, 70, 90 S.Ct. 355, 359, 24 L.Ed.2d 264 (1969).

to prohibit the intentional concealment of material facts by a federal official in the course of completing a financial disclosure statement required by an agency of its employees before the enactment of EIGA. *United States v. Muntain,* 610 F.2d 964, 971 (D.C.Cir.1979).

Defendant, however, argues that it was the intent of Congress to limit enforcement of the financial disclosure report requirements to civil sanctions set forth in EIGA at 2 U.S.C. § 706. That section allows the Attorney General to bring a civil action against anyone who knowingly and willfully falsifies any information in his report or knowingly and willfully fails to file a report.[2] A maximum penalty of $5,000 may be imposed. A provision in the first draft bills of EIGA establishing criminal sanctions for falsified disclosure reports, see 123 Cong.Rec. 21007 (1977), was deleted from the act as it was finally passed by both Houses of Congress. Defendant argues that the deletion of the criminal penalties demonstrates Congress' intent that no criminal sanctions should apply to the falsification of EIGA reports.

At the outset, it must be noted that EIGA contains no express repeal or preemption of section 1001 as it applies to falsified disclosure reports. The act does specify that EIGA's provisions "shall supersede and preempt any State or local law with respect to financial disclosure," 2 U.S.C. § 708, but nowhere in the act is there an equivalent provision concerning other federal laws.

[2] Nor does anything in the text of EIGA or section 1001 establish an implicit repeal or preemption by the former of the latter as it pertains to falsified disclosure reports. Repeals by implication, of course, are disfavored. *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 783, 785 (D.C.Cir.1971).[3] A repeal by implication may be found, however, only where there is "some manifest inconsistency or positive repugnance between the two statutes." *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 565, 83 S.Ct. 520, 525, 9 L.Ed.2d 523 (1963). Unless "the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have con-

[2] Section 706 provides:

"§ 706. Failure to file or filing false reports The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000. No action may be brought under this section against any individual with respect to a report filed by such individual in calendar year 1978 pursuant to section 701(d) of this title."

[3] Defendant attempts to avoid the abundant authority disfavoring repeals by implication by characterizing his theory differently: he asserts that his argument is not that section 1001 is repealed by EIGA but that it is "inapplicable" to it. This distinction has no substance. Defendant is arguing that a general statute which, as explained above, on its face is controlling, has no force in a particular instance. This is the type of "repeal" that the Court of Appeals said could not be executed by implication in *Committee for Nuclear Responsibility v. Seaborg,* 463 F.2d at 785. "To assume ... that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it is, in effect, to accomplish a partial repeal of the general statute." *United States v. Burnett,* 505 F.2d 815, 816 (9th Cir.1974), *cert. denied,* 420 U.S. 966, 95 S.Ct. 1361, 43 L.Ed.2d 445 (1975).

United States v. DeLaurentis, 491 F.2d 208 (2d Cir.1974), upon which defendant relies for the proposition that a general criminal statute may be found inapplicable to conduct regulated by another statute notwithstanding its "plain meaning" is inapposite. That case concerned the use of 18 U.S.C. § 241, a criminal statute enacted in 1870 to protect the rights to newly-freed former slaves, as a basis for a prosecution for threats to interfere with activity protected by the National Labor Relations Act. The Second Circuit stated that "[a]lthough the conduct of [the defendants] may have been reprehensible, we do not believe that Congress has made it criminal," 491 F.2d at 209, and found that the victims' rights "must be vindicated exclusively through" the Labor Act. *Id.* at 211. In the instant case, by contrast, the clear purpose of section 1001 is to make a crime the making of false statements to the government in matters including, under *United States v. Muntain,* financial disclosure reports.

current operation," no repeal will be implied. 1A C.D. Sands, *Sutherland Statutory Construction*, § 23.10, at p. 231 (4th ed. 1972). There is no inconsistency between section 706 of EIGA and 18 U.S.C. § 1001. Section 1001 makes it a crime to knowingly and willfully falsify or conceal a fact, make a false statement, or use a false writing knowing the writing to contain a false statement. Section 706 provides a civil enforcement mechanism for the knowing and willful falsification of an EIGA disclosure report or the knowing and willful *failure to file* such a report. Nothing in one statute compels, for example, the commission of an act prohibited by the other; rather, they proscribe the same conduct and complement each other in that the civil statute attacks the lesser offense of non-filing as well as intentional false filing.

[3, 4] Where two statutes concern the same subject, a court considering them must make every effort to reconcile allegedly conflicting provisions and give effect to both, so long as doing so does not deprive one or the other of its essential meaning. *Wilderness Society v. Morton*, 479 F.2d 842, 881 (D.C.Cir.) *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973). Here, however, the prohibitory language of the two statutes does not conflict. As a result, the only matter to "reconcile" is the availability of both civil and criminal remedies for false statements in EIGA reports. This poses no problem, inasmuch as it is established that where a single act violates more than one statute, the government may elect to prosecute under either. *United States v. Brown*, 482 F.2d 1359, 1360 (9th Cir.1973), citing *United States v. Gilliland*, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941). In *Brown*, the Ninth Circuit ruled that, assuming the making of false statements on bid forms was a violation of either of two other false statements statutes, 18 U.S.C. § 1010 or § 1012, such conduct could also be prosecuted under the general statute, section 1001, with its harsher penalties. *Accord, United States v. Burnett*, 505 F.2d at 816 (government had the option of proceeding under 18 U.S.C. § 1919, concerning false statements to obtain unemployment benefits for prior federal service, or section 1001).

Defendant also argues that since section 706 does not contain a parallel provision to that in section 704 of EIGA which provides that the Attorney General's authority to bring a civil action to enforce Section 704 "shall be in addition to any other remedy available under statutory or common law," section 1001 may not apply to the filing of false EIGA reports. Section 704 regulates the public's accessibility to filed EIGA reports. It makes it unlawful to obtain or use an EIGA report for any unlawful purpose, for any commercial purpose (outside the news media), to determine credit ratings, and for the solicitation of money. 2 U.S.C. § 704(e)(1). The civil remedy under section 704 pertains to such proscribed uses of EIGA reports. 2 U.S.C. § 704(e)(2). The language in section 704(e)(2) preserving other remedies protects the rights of filers of EIGA reports to bring suit on any private cause of action arising from the misuse of their financial disclosure information. As there is no parallel private right with respect to the requirement in section 702 to file correct reports, there is no proper analogy between section 706 (which enforces section 702) and section 704.

Nor does section 705 of EIGA, which provides that a person who relies on an advisory opinion by the appropriate congressional committee in making his disclosure report "shall not . . . be subject to any sanction provided in this chapter," preclude the instant prosecution under section 1001. First, there is no assertion that defendant prepared the disclosure reports in question in reliance upon any such advisory opinion. Second, section 705 unambiguously limits its forgiveness provision to sanctions under EIGA and does not purport to preempt other remedies such as section 1001. 2 U.S.C. § 705(b).

The plain language of the two statutes shows no "manifest repugnance," no conflict that would indicate an implied repeal. It has been held that under such circumstances the inquiry ends at this point; that it is improper to turn to legislative history to look for a repeal by implication. *Demby v. Schweiker,* 671 F.2d 507, 510 (1981) (Opinion announcing judgment of the court by MacKinnon, J., with one judge concurring in the result). In any case, as explained below, an exploration of the relevant legislative history does not yield support for defendant's contention that Congress intended section 1001 not to apply to the acts he is alleged to have committed.

[5] Because EIGA and section 1001 are not irreconcilable, there must be an affirmative showing of an intention to repeal before the Court may find the criminal provision repealed by implication. *Izaak Walton League of America v. Marsh,* 655 F.2d 346, 366 (D.C.Cir.), cert. *denied,* 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). Next to the statute itself, the conference report of a bill is the most persuasive evidence of congressional intent, since it represents the final statement of the terms agreed to by both Houses. *Demby v. Schweiker,* 671 F.2d at 510 (Opinion by MacKinnon, J.). However, because the conference report of S. 555 (the bill which became EIGA), 124 Cong.Rec. 35650–72 (1978), does not discuss the deletion of the previously proposed criminal provision or the applicability of other criminal sanctions to the act, see *id.* at 35668, the parties have referred only to statements of individual Representatives in the debates.

The original Senate bill (S. 555) and various House bills preceding the enactment of EIGA contained both a criminal penalty for knowing and willful falsifications and a civil penalty for misstatements. The criminal penalties were deleted and the requirements for civil sanctions were made more stringent during deliberations on the act in the House, apparently during discussions on H.R. 13850, a proposed substitute bill. In response to defendant's argument that the deletion of the criminal penalty indicates Congress' intent that no criminal sanctions apply to EIGA, the government contends that it just as logically could be argued that the criminal penalty was removed because section 1001 rendered it superfluous and that the requirements for the civil sanctions were heightened because of a concern that Members of Congress would be exposed to nuisance suits for inadvertent errors on their disclosure reports.

None of the statements in the legislative history referred to by defendant provide unequivocal support for his argument. Defendant quotes Representative Danielson who, discussing the particulars of H.R. 13850, noted that

> provisions of the bill do not provide for a criminal penalty but do provide for a civil penalty for failure to comply with the disclosure provisions.

124 Cong.Rec. 30414 (1978). This remark does not discuss the applicability of section 1001, and indeed does not specifically refer to false statements. It merely notes what sanctions are and are not contained within EIGA itself. The statement of Representative Moorhead that the notable improvements of the substitute bill included "the deletion of *unnecessary* criminal penalties with respect to [the] financial disclosure section," 124 Cong.Rec. 30415 (1978) (emphasis added), does not compel the conclusion that Congress felt that it was unnecessary to include criminal penalties because civil sanctions would achieve the desired result. That Congressman equally could have meant that the penalties were unnecessary because of the existence of section 1001.

Likewise, Representative Schroeder's observation that "there is no specific criminal sanction for misfiling," 124 Cong.Rec. 30419 (1978), refers to the provisions of EIGA and does not speak to the *general* criminal sanction of section 1001. Her comments at 124 Cong.Rec. 30422 (1978) under the heading "Failure to File or Falsifying Reports," to the effect that under EIGA intentional violations would be prosecuted by the Attorney General under what is now section 706 and that technical or inadvertent violations should be resolved informally, similarly present nothing addressing the applicability of criminal sanctions.

The statements of Representative Preyer at 124 Cong.Rec. 30425 (1978) cited by defendant note that under the bill's compliance and enforcement provisions Members of Congress would "not be subject to any civil penalty under the act for inadvertent error or omission in the disclosure." Again, this does not address the question of whether EIGA would not be covered by other criminal sanctions but simply assures the Members of Congress that they would be protected from civil suits for minor, unintentional errors or omissions in their disclosure reports. Similarly, Representative Frenzel's remark that "now that the criminal penalties have been removed from this legislation, against my wishes, I might add, there is only a civil penalty to deter a potential nondiscloser," 124 Cong.Rec. 30430 (1978), is consistent with the applicability of section 1001 inasmuch as the criminal statute would not apply to failures to file. Nor does Representative Gonzales' comment that "it is not a criminal offense to file incorrect information," 124 Cong.Rec. 32013 (1978), suggest that section 1001 was intended not to reach the alleged conduct at issue in the instant case: the mere filing of incorrect information does not meet the requirements for a conviction under section 1001. Representative Bauman's comment that the enforcement provision of EIGA "would have been a criminal penalty, but it was changed to get the bill through the House," 124 Cong.Rec. 30457 (1978), likewise says nothing about section 1001.

[6] Defendant simply has failed to make the "affirmative showing" of an intent to repeal required by *Izaak Walton League*. Moreover, the only statement in the legislative history of EIGA specifically referring to section 1001 is contrary to his argument. Representative Wiggins, who, according to defendant, was the Ranking Minority Member of the Select Committee on Ethics when the legislation was being developed, had this to say in the context of the removal of the act's criminal penalty for falsified disclosure statements:

> Some Members have been concerned about their criminal liability. Well, they should be concerned about their criminal liability. I hope they have not been led to believe that by eliminating the criminal sanctions in this bill they have been relieved of vulnerability, because they have not.
>
> Title 18 contains a section 1001 which makes it a felony subject to 5 years' imprisonment to willfully and knowingly file a false document or false statement. That is general law. It continues in effect, and that will apply with respect to the statements filed here. Therefore, even though there are no explicit criminal penalties in this bill, the Members will all be subject to criminal penalties if the Attorney General elects to proceed under 18 U.S.C. 1001.

124 Cong.Rec. 30429 (1978).[4] Representative Wiggins also made reference to the

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[4] Representative Wiggins went on to present this hypothetical:

"Let me give the Members a little scenario on how this is apt to apply. You file your statement, you make a good faith estimate of the value with respect to an asset you own. It is a good faith estimate in your own mind, but one of the persons who reads your statement is an opponent or a member of the press. He does not agree that your estimate is in fact in good faith; he thinks it is grossly understated. The press or your opponent goes to a U.S. attorney and says that he believes you have made a willfully false statement because you have significantly understated the value of an asset on your report.

"What is the position of the U.S. attorney? He has a hot potato in his hand. He has a Member of Congress who is being accused. If he pooh-poohs the allegation, he fears the publicity of cover-up, particularly if the complaint comes from the press. On the other hand, if he proceeds, he fears the problem of discrimination against a sitting Member of Congress, political manipulation, and the like.

"What does he do? Well, I will tell the Members what the typical U.S. attorney will do. He will pass the buck to the grand jury. He will in effect say, 'I am not going to decide this difficult case. He will let the grand jury make a decision.'

"Well, that is just hunky-dory, is it not? That means that whatever your legal difficulty, you are in deep trouble politically, with the grand jury being impaneled to consider a complaint made against you with respect to a misstatement or alleged misstatement filed under this section.

"So I am only reminding the Members of the vulnerability they are assuming for themselves if they adopt these provisions."
124 Cong.Rec. 30429 (1978).

applicability of general criminal statutes in the United States Code to EIGA during a discussion of a proposed amendment directed at Members who knowingly permit the use of House stationery for fundraising activities. 124 Cong.Rec. 30444 (1978). Representative Thompson reacted to this point by noting that Wiggins had "made a very important point" that "this does become a part of the United States Code, that it does involve a criminal penalty." *Id.*

It is clear from the Congressional Record that Representative Wiggins was a relentless opponent of financial disclosure requirements and that the Supreme Court has "often cautioned against the danger when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB v. Fruit and Vegetable Packers and Warehousemen*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964). Yet Representative Wiggins' statement constitutes the *only* pronouncement on the relevance of section 1001 to falsified disclosure reports; there simply are no remarks whatsoever from any of the bill's proponents to turn to as "more accurate" explanations of its effect than Wiggins'.[5] Furthermore, the Congressional Record shows that not one Member rose to dispute what Wiggins had to say.

Representative Wiggins was not the only Member interested in the effect of criminal provisions of the United States Code upon EIGA's financial disclosure report requirements. Representative Preyer, who was the Chairman of the Select Committee on Ethics at the time, asked the Department of Justice in April 1978 for an advisory opinion on this very question as it pertained to reports filed by Executive Branch employees. A reply came in the form of a letter from then-Assistant Attorney General for Legislative Affairs Patricia M. Wald. In her letter, Judge Wald stated that it was the Justice Department's opinion that section 1001 "would apply to an Executive Branch employee who knowingly and willfully falsified a material fact in a financial disclosure statement required by bills such as [those under consideration]." Exhibit B to Government's Amended Response to Motion to Dismiss, at 2. Representative Preyer had the benefit of this opinion when he made the remarks quoted from the Congressional Record above. It is further apparent from Judge Wald's letter that Representative Preyer had also been advised by the Clerk of the House of his opinion "that the knowing and willful falsification of a material fact on a statement required to be filed by a Member of Congress, congressional employee or candidate for Congress would subject the reporting individual to the provisions of 18 U.S.C. § 1001." *Id.* at 1.[6]

The inescapable conclusion is that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports—otherwise, a specific repealing or exempting clause would have been included in the act. Indeed, the form issued by the Clerk of the House upon which Members of Congress are to make their financial disclosures carries at the signature line the following warning:

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[5] During the final, rapidly-passing minutes of his rebuttal to the government's oral argument, defendant's counsel suggested a legislative history matter that he neither addressed in his oral argument nor his papers filed with the Court. Counsel stated that "when they [Members of the House] were discussing civil suits filed against them, so on an[d] so forth, an amendment was actually introduced to permit 1001 to survive under these circumstances, introduced, I believe, by Congressman Panetta, and that was defeated by the House. So with 1001 in front of their eyes and everything else, they excluded a criminal sanction ...." (Unofficial excerpt of transcript prepared for Court by Court Reporter).

The amendment to which counsel evidently referred appears at 124 Cong.Rec. 32009 (1978). It provided for a complaint procedure similar to those under federal election laws by which any person could report a violation of EIGA to the Office of Government Ethics. The amendment, as offered by Representative Panetta, stated that "[a]ny person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code." *Id.* It did not concern the applicability of section 1001 to disclosure reports, nor was that issue raised during any part of the debate on the amendment. 124 Cong.Rec. 32209-11 (1978).

[6] Counsel for the government stated at oral argument that the government attempted to obtain the opinion of the Clerk of the House but was unable to do so because it is an "internal document."

> NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. § 706 and 18 U.S.C. § 1001.

Exhibit A to Government's Amended Response to Motion to Dismiss, at 1. At the hearing, the parties were unable to advise the Court precisely from where came this language other than to opine that it was placed on the form by the Office of the Clerk of the House, nonetheless it evidently has appeared on such forms for a number of years without question from the many Members of Congress and legislative employees who have had occasion to execute the document.[7]

II. *The Relevance of the Speech or Debate Clause to Reports Filed by Legislators under EIGA*

[7] Defendant argues that the filing by Members of Congress of financial disclosure reports under EIGA constitutes "legislative activity" protected by the Speech or Debate Clause of the Constitution.[8] It does not. The Speech or Debate Clause protects Members of Congress from judicial inquiry into their legislative acts or the motivation for the actual performance of their legislative acts. *United States v. Brewster*, 408 U.S. 501, 509, 92 S.Ct. 2531, 2536, 33 L.Ed.2d 507 (1972). The filing of an EIGA report is not a "legislative act," nor bears upon a legislator's motivation for any legislative act.

Brewster was the prosecution of a former United States Senator indicted under a general criminal statute for allegedly accepting a bribe in exchange for a promise relating to an official act, *i.e.*, agreeing to vote a particular way on certain legislation. The Supreme Court held that the Speech or Debate Clause would not preclude the Senator's prosecution because an examination of the indictment and the criminal statute upon which it was based "reveal[ed] that no inquiry into legislative acts or motivation for legislative acts [was] necessary for the Government to make out a prima facie case." 408 U.S. at 525, 92 S.Ct. at 2544.

Defendant asserts that because the Constitution confers upon each House the authority to discipline its members, U.S. Const. art. I, § 5, and because the House may discipline its members for matters relating to financial disclosure reports filed with its Clerk, the filing of such reports falls within the protection afforded "legislative activity" by the Speech or Debate Clause. *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), cited by defendant, does not support this proposition, nor does *Brewster*, decided the same day. In *Gravel*, the Supreme Court declared that

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other mat-

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[7] A memorandum from the Clerk of the House to "All Members, Officers and Employees Required to File Financial Disclosure Statements Under Rule XLIV [of the House of Representatives]," a copy of which was submitted to the Court on June 8, 1983 by defendant, advised of the instant prosecution and stated that "this office takes no position on [the] question" of "whether [section 1001] applies to filings under the Rule." (In Rule XLIV, section 2, the House adopted the financial disclosure obligations of EIGA as its own internal rule.)

This memorandum has no bearing on the matters at issue here. No matter what the opinion of the Clerk of the House might be at the present about section 1001's relevance to financial disclosure requirements, the memorandum does not alter the fact that the Clerk of the House in 1978 evidently put the Chairman of the House Select Committee on Ethics on notice that the section would apply to reports filed pursuant to EIGA. Moreover, the memorandum only refers to section 1001's effect on statements required by the internal House Rule—it carefully avoids mention of the section's applicability to reports compelled by EIGA.

[8] The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6.

Myers, asserting that they could have been, but were not, prosecuted under section 1001 for false statements in EIGA reports. Defendant emphasizes the Second Circuit's statement in *Myers* that Lederer "falsely listed [on his disclosure report] his $5,000 share of [a] bribe as 'a consulting fee.'" 692 F.2d at 849. But he and the others were prosecuted for other, more serious offenses. The fact that the government did not add every conceivable offense to the Abscam indictments does not show that those defendants were treated more leniently than the defendant in the instant case.

[10] As defendant has made no colorable showing that he was singled out for prosecution his request for dismissal of the indictment on this ground as well as his motion for discovery are denied. Nonetheless, it can be observed that there appears to be no basis whatsoever for defendant's contention that the government harbored an improper motivation for initiating this prosecution. As noted above, in *Diggs* the Court of Appeals discerned two kinds of improper motives for selection: those lacking a rational basis under the statute being enforced and those inherently offensive to the Constitution. 613 F.2d at 1003. There can be no serious doubt that this prosecution has a rational basis under both EIGA and section 1001. Prosecuting false statements in EIGA reports is consistent with EIGA's purposes which include, *inter alia*, deterring conflicts of interest and maintaining a high level of integrity among public officials. *See* S.Rep. No. 170, 95th Cong., 1st Sess. 21–22, *reprinted in* 1978 U.S.Code Cong. & Ad.News 4216, 4237–38. It also is consistent with the purpose of section 1001 to ensure that people do not intentionally make false statements to agencies and departments of the government.

Instead, defendant argues generally that the government is out to punish him for exercising his rights under the first amendment to speak out against the executive branch and, in particular, the Internal Revenue Service. However, none of the numerous materials defendant has presented as exhibits to his motion support this contention in any way. While he provides a vast number of documents of his own creation—letters to various officials, essays submitted by him to the Congressional Record, books critical of the IRS—chronicling his own crusades, but a few of the papers submitted concern the executive branch's responses to his activities. In not one of these documents is there any evidence that the government harbored a desire to punish defendant for speaking out.

One of these communications is a copy of a letter from the then-Commissioner of Internal Revenue to defendant, dated February 24, 1978, in response to defendant's letter to the Commissioner alleging numerous improprieties on the part of the IRS. The Commissioner's letter demonstrates no hostility whatsoever, but on the contrary is polite and responsive in detail to defendant's allegations. Consistently through the letter the Commissioner assured defendant that his charges would be investigated once defendant would provide more specificity as to his allegations. At oral argument defendant's counsel referred to this letter as "virtually a threat," asserting that it warned defendant to cease "hurting the morale" of IRS employees. The only portion of the Commissioner's letter to which this possibly could refer is the last paragraph, which reads:

> I have tried to be responsive to your concerns and assure you that the Service will not tolerate discrimination in either its personnel policies or its examination policies based upon religion. Any facts at all to support your allegations in this regard should be made known to me. Generalized allegations do a disservice to the thousands of dedicated people who make up the Internal Revenue Service.

Exhibit II to Motion to Dismiss. This is not a threat. Nor does it demonstrate any antagonism on the part of the Commissioner, the IRS or the executive branch toward defendant.

Similarly, the letters from the Assistant Attorney General of the Justice Department, Criminal Division, to defendant dated

December 11, 1981 and February 8, 1982 concerning other allegations of IRS misconduct provide no support to defendant's assertion that the government has a vendetta against him. *See* Exhibit VIII to Motion to Dismiss. The letter from the Chairman of the Securities and Exchange Commission to defendant dated January 14, 1983 likewise is innocuous.

For the foregoing reasons, and upon consideration of the entire record in this matter, defendant's motion to dismiss the indictment and his motion for discovery as to the question of selective prosecution shall both be denied.

It is this Court's respectful view that as the Speech or Debate Clause issue is immediately appealable, it would be more efficient for the Court of Appeals to consider the other two issues raised in the motion to dismiss at the same time. In *United States v. Myers*, 635 F.2d 932, 935–36 (2d Cir.) (pretrial appeal), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980), the Second Circuit not only ruled that a challenge to an indictment on separation of powers grounds was immediately appealable along with the Speech or Debate Clause question, but declared that it "would not be too extravagant to suggest that a Member of Congress should be entitled to pre-trial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment." The court noted that circumstances particular to Members of Congress militating in favor of a pretrial appeal of all issues were "especially compelling." *Id.* at 936.

The Court of Appeals for this Circuit has not spoken as to the matters addressed in this dictum from *Myers*. Nonetheless, the inefficiency and delay that piecemeal appeals would cause persuade this Court that the entire matter addressed this date should be submitted to the Court of Appeals at one time. The trial previously scheduled for June 20, 1983, must however, be continued pending appellate review of the instant decision.

An Order consistent with the above accompanies this Memorandum Opinion.

UNITED STATES of America

v.

George Vernon HANSEN, Appellant.

No. 84-5377.

**United States Court of Appeals,
District of Columbia Circuit.**

**Argued Dec. 18, 1984.
Decided Aug. 30, 1985.**

Former Congressman was convicted in the United States District Court for the District of Columbia, Joyce Hens Green, J., of making false statements in matters within the jurisdiction of a department or an agency of the United States, and he appealed. The Court of Appeals, Scalia, Circuit Judge, held that: (1) federal statute, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, was applicable to the intentional falsification of annual financial disclosure reports required to be filed by Congressman under the Ethics in Government Act; (2) failure of Congressman to disclose on his reports bank loan to wife cosigned by third party, silver commodities profit, loan from third party, and loans from private individuals was "material" so as to sustain the conviction; and (3) Congressman's rights under the Speedy Trial Act were not violated.

Affirmed.

1. Fraud ⟹68.10(1)

Federal statute, 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, is a statute of general applicability, designed to protect a myriad of governmental activities.

2. Fraud ⟹68.10(3)

Term "department," used in 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, includes a committee of the House of Representatives.

See publication Words and Phrases for other judicial constructions and definitions.

3. Fraud ⟹68.10(3)

Term "jurisdiction," used in 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, embraces the authority to conduct an official inquiry.

See publication Words and Phrases for other judicial constructions and definitions.

4. Fraud 🔑68.10(3)

Federal statute, 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, was applicable to the intentional falsification of financial disclosure reports required to be filed by members of Congress under the Ethics in Government Act of 1978, §§ 101–109, 2 U.S.C.A. §§ 701–709.

5. Statutes 🔑158

Repeals by implication will not be found unless an intent to repeal is clear and manifest.

6. Statutes 🔑158

Congress will expressly designate the provisions of former related statutes, whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction.

7. Fraud 🔑68.10(1)
United States 🔑41

Federal statutes, 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, and Ethics in Government Act of 1978, § 106, 2 U.S.C.A. § 706, authorizing Attorney General to bring civil action against member of Congress who knowingly and willfully falsifies or fails to file a financial disclosure report, combine to produce a natural progression in penalties: those who intentionally fail to file such reports are subject only to the civil sanction of § 706, while those who lie on their reports are additionally subject to criminal penalties of § 1001.

8. Action 🔑35

Language of Ethics in Government Act of 1978, § 104(e), 2 U.S.C.A. § 704(e), prohibiting use of financial disclosure reports filed by Members of Congress for commercial purposes, determination of credit ratings, and solicitation of money and providing that civil action by Attorney General for violation of that prohibition shall be in addition to any other remedy available under statutory or common law, was intended to make clear that the statute does not preclude private civil actions under state law for defamation of credit or invasion of privacy.

9. Fraud 🔑68.10(2)

Good faith reliance upon advice of counsel establishes a defense against criminal sanctions imposed by 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States.

10. Fraud 🔑68.10(2)

Reliance by a member of Congress upon an advisory opinion by designated committee of House of Representatives or Senate interpreting Ethics in Government Act of 1978, §§ 101–109, 2 U.S.C.A. §§ 701–709, as that Act relates to financial disclosure reports, establishes a defense against criminal sanctions under 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States.

11. Fraud 🔑68.10(4)

A lie influencing the possibility that an investigation might commence stands in no better posture under 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, than a lie distorting an investigation already in progress.

12. Fraud 🔑68.10(4)

Failure of Congressman to disclose on annual financial disclosure reports required under the Ethics in Government Act of 1978, §§ 101–109, 2 U.S.C.A. §§ 701–709, bank loan to his wife cosigned by third person, silver commodities profit, loan from same third party, and in loans from private individuals, was "material" and, thus, constituted a violation of 18 U.S.C.A. § 1001, proscribing the willful filing of false statements in any matter within the jurisdiction of a department or an agency of the United States, since such failure related to financial transactions within charge of House

Committee on Standards of Official Conduct and tended to conceal information that would have prompted investigation or action.

13. Fraud ⟹68.10(1)

Free use of credit of third person, which cosignature of that person of loan conferred, was assuredly something of value and, thus, constituted a "gift" to Congressman's spouse which should have been reported on Congressman's annual financial disclosure report required under Ethics in Government Act of 1978, § 102(d)(1)(B), 2 U.S.C.A. § 702(d)(1)(B).

See publication Words and Phrases for other judicial constructions and definitions.

14. Criminal Law ⟹577.10(3)

Assuming that date fixed in district court order for defendant's trial, i.e., March 19, was subject to no further extension permitted by the Speedy Trial Act, 18 U.S.C.A. §§ 3161–3174, failure to comply with that order simply resulted in retraction of defendant's waiver of speedy trial rights and reacquisition of those rights by defendant on March 20, so that commencement of trial on March 20 was lawful and did not violate those rights, since virtually all of the time from January 26, i.e., the date of defendant's waiver of speedy trial rights, to March 19 was excludable from the 70-day time calculation required under the Act due to the numerous pretrial motions filed by the government and defendant. 18 U.S.C.A. § 3161(h)(1)(F).

Appeal from the United States District Court for the District of Columbia (Criminal No. 83-00075).

Nathan Lewin, Washington, D.C., with whom Stephen L. Braga and Frank A.S. Campbell, Washington, D.C., were on the brief, for appellant.

Reid H. Weingarten, Atty., Dept. of Justice, Washington, D.C., with whom James M. Cole, Atty., Dept. of Justice, Washington, D.C., was on the brief, for appellee.

U.S. Senator Orrin G. Hatch, Washington, D.C., was on the brief for himself and other members of the United States Congress as amici curiae, urging reversal.

Allan A. Ryan, Jr., Washington, D.C., was on the brief for the Institute for Government and Politics, Free Congress Foundation and Lawrence A. Withers, amici curiae, urging reversal.

Before GINSBURG and SCALIA, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court by SCALIA, Circuit Judge.

SCALIA, Circuit Judge:

Appellant, former Representative George V. Hansen, appeals from his conviction for making false statements in matters within the jurisdiction of a department or agency of the United States in violation of 18 U.S.C. § 1001 (1982), based on omissions in financial disclosure statements he filed under the Ethics in Government Act of 1978, Pub.L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of Titles 2, 5, 18, 26, and 28 U.S.C. (1982)) ("EIGA"). The primary issues on appeal are whether violations of the EIGA are subject to the criminal penalties of 18 U.S.C. § 1001, whether the omissions from Hansen's forms were material, and whether Hansen's trial started within the time limits established by the Speedy Trial Act, 18 U.S.C. §§ 3161–74 (1982).

I

Title I of the EIGA, 2 U.S.C. §§ 701–09, requires Members of Congress to file annual financial disclosure reports detailing, with certain exceptions, their income, gifts, assets, financial obligations, and business transactions. Hansen was indicted on four counts for failing to disclose, respectively, a $50,000 bank loan to his wife, cosigned by Nelson Bunker Hunt, on his form for 1978, an $87,475 silver commodities profit on his form for 1979, a $61,503.42 loan from Nelson Bunker Hunt on his form for 1980, and $135,000 in loans from private individuals on his form for 1981. He was not indicted, however, under any provision of the EIGA, but rather under 18 U.S.C. § 1001, which forbids the willful filing of false statements in any matter within the jurisdiction of a department or agency of the United States.

Before trial, Hansen moved to dismiss the indictment on grounds that § 1001 was not applicable to EIGA violations, that he was singled out for prosecution in violation of the fifth amendment to the Constitution, and that the filing of financial disclosure reports under the EIGA constituted "legislative activity" protected by the Speech and Debate Clause of the Constitution, U.S. Const. art. I, § 6, cl. 1. The District Court denied the motion. *United States v. Hansen*, 566 F.Supp. 162 (D.D.C.1983). This court affirmed the order of the District Court with respect to the Speech and Debate Clause issue and found that the other two issues did not involve an appealable "final decision" under 28 U.S.C. § 1291. *United States v. Hansen*, No. 83-1689 (D.C.Cir. Aug. 1, 1983) (unpublished Order), *cert. denied*, — U.S. —, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984).

At trial, Hansen relied principally on an advice-of-counsel defense, contending that two of his attorneys had advised him that the transactions in question were not reportable. The jury rejected this defense and found the accused guilty on all four counts. Hansen appeals under 28 U.S.C. § 1291. He and *amici*[1] urge reversal on numerous grounds, only three of which warrant discussion beyond that contained in the District Court's opinions and rulings.

II

[1-4] The most significant issue presented is whether 18 U.S.C. § 1001 has any application to EIGA violations. The language of the statute reads, in relevant part, as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ... makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1001 is a statute of general applicability, designed to protect a "myriad [of] governmental activities." *United States v. Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 1946, 80 L.Ed.2d 492 (1984). Its "sweeping ... language," *id.*, clearly embraces the omissions on Hansen's EIGA forms. The House Committee with which the forms were filed is a "department" for purposes of § 1001, since that term "was meant to describe the executive, legislative and judicial branches of the Government." *United States v. Bramblett*, 348 U.S. 503, 509, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955). *See United States v. Diggs*, 613 F.2d 988, 999 (D.C.Cir.1979), *cert. denied*, 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 838 (1980) (false statements submitted to House of Representatives Office of Finance covered by § 1001). The subject of the forms is also a "matter within the jurisdiction" of that department, since the Supreme Court has held that phrase "should not be given a narrow or technical meaning," *Bryson v. United States*, 396 U.S. 64, 70, 90 S.Ct. 355, 359, 24 L.Ed.2d 264 (1969), but applies whenever there is "'statutory basis for an agency's request for information,'" *United States v. Rodgers*, 104 S.Ct. at 1947 (quoting *Bryson*, 396 U.S. at 71, 90 S.Ct. at 359). The "request" here is made by the statute itself, which requires the forms to be filed with the Clerk of the House for transmission to the Committee, 2 U.S.C. §§ 703, 705. The fact that the Committee can take no dispositive action with regard to matters disclosed on the forms, but can only investigate and make recommendations to the full House, *see* House Rule X, cl. 4(e)(1)(B), is inconsequential, since the term "jurisdiction" embraces the authority to conduct an official inquiry, *see United States v. Rodgers*, 104 S.Ct. at 1947 & n. 2.

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[1] One hundred twenty-three members of Congress filed an *amicus* brief arguing that Congress did not intend criminal sanctions to attach to EIGA violations. The other *amicus* brief, also on appellant's behalf, was filed by the Institute for Government and Politics, Free Congress Foundation and Lawrence Arlen Withers.

In light of the plain applicability of § 1001, Hansen misperceives the issue before us when he urges, to quote the caption of the first section of argument in his principal brief, that "Congress prescribed only a civil remedy and did not authorize criminal punishment for the submission of a false EIGA statement." Brief for Appellant at 27. It was not necessary for the Congress that enacted the EIGA to authorize criminal punishment, for that authorization had been conferred by an earlier Congress, and remained on the statute books. The precise issue is whether the Congress that enacted the EIGA *precluded* the criminal sanctions that would otherwise attach.

[5] In approaching that issue, we give appellant the benefit of the doubt on a preliminary epistemological point: We will assume (without deciding) that an erroneous congressional belief, expressed in the statute or evident in its legislative history, that § 1001 did not by its terms apply, would be fully equivalent to an explicit decision to preclude its application, so that the result would be an inadvertent *pro tanto* repeal of § 1001 rather than the enactment of an obligation inadvertently subject to criminal penalties. On the other hand, we have no choice but to make appellant's task more difficult on another preliminary point: It is a venerable rule, frequently reaffirmed by the Supreme Court, that "'repeals by implication are not favored,'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936)); *see generally* 1A SUTHERLAND STATUTORY CONSTRUCTION § 23.10 (C. Sands 4th ed. 1972 & 1985 Supp.), and will not be found unless an intent to repeal is "'clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939) (quoting *Red Rock v. Henry*, 16 Otto 596, 602, 106 U.S. 596, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251 (1883)). It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

[6] Hansen argues that the presumption against implied repeal is inapplicable to this case, since no repeal is involved. He reasons that since there was no obligation for Members of Congress to make financial disclosures before adoption of the EIGA in 1978, there was no preexisting criminal liability to repeal. We cannot accept this resourceful characterization of the issue, which would render statutes such as § 1001 the most feeble of enactments, virtually requiring for their application to new obligations (as appellant's brief at times urges) an affirmative intent, in the legislation creating the new obligations, that they should apply. The fallacy in appellant's analysis is that it takes the presumption against implied repeal to be a rule based exclusively upon assumed substantive inertia rather than—what in our view it is—a rule based primarily upon assumed legislative practice. The major rationale of the presumption, in modern times at least, is not that Congress is unlikely to change the law—so that in the present case, where there was no preexisting criminal liability for this particular filing, the presumption would be inapplicable; but rather, that Congress "legislate[s] with knowledge of former related statutes," *Continental In-*

surance Co. v. Simpson, 8 F.2d 439, 442 (4th Cir.1925), and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. The application of that rationale to the present case is clear: The terms of § 1001 cover falsification of EIGA financial disclosure forms; if Congress wished to exclude that coverage it would normally have said so; we will not readily conclude that it did so by implication.

[7] With these principles in mind, then, we proceed to consider whether the EIGA repeals the application of § 1001 to its disclosure provisions. It does not do so expressly—even though it does take pain to exclude application of "any *State or local law* with respect to financial disclosure by reason of holding the office of Member or candidacy for Federal office." 2 U.S.C. § 708 (emphasis added). (We note in passing that, if repeal was in fact intended, this absence of express exclusion is even more strange than it would normally be since, as we shall discuss in more detail below, the threatened application of § 1001 was explicitly brought to the attention of a House committee that reported one version of the bill both by the Department of Justice and by the Clerk of the House, and to the attention of the full House, in floor debate, by two of its Members.) We look then, for some indication of implicit repeal strong enough to overcome the contrary presumption. Hansen points to 2 U.S.C. § 706, which provides:

> The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

He argues that this provision "appears, on its face, to contain the complete sanction that Congress has prescribed for any knowing and willful falsification." Brief for Appellant at 29. It does indeed represent the complete sanction that the 1978 Congress provided, but the question remains whether it clearly suggests a repeal of the sanction provided by earlier legislators. We think not. There is no difficulty in applying both 18 U.S.C. § 1001 and 2 U.S.C. § 706. Indeed, the two sections combine to produce a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of § 706, while those who lie on their forms are additionally subject to the criminal penalty of § 1001. If this does not represent evident harmony, it at least does not begin to approach the "irreconcilable conflict" that the Supreme Court has instructed us to require as textual evidence of an implicit repeal. *Red Rock v. Henry*, 106 U.S. at 601, 1 S.Ct. 438. *See, e.g., Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1982). Surely the attachment of this civil sanction is less suggestive of an intent to displace § 1001 than the attachment of a criminal sanction would be. Yet even in this *a fortiori* situation, the courts have uniformly rejected displacement claims. For example, in *United States v. Burnett*, 505 F.2d 815 (9th Cir.1974), *cert. denied sub nom. Lyon v. United States*, 420 U.S. 966, 95 S.Ct. 1361, 43 L.Ed.2d 445 (1975), defendants argued that they should have been charged under a specific misdemeanor statute forbidding false statements to obtain unemployment benefits rather than under the felony provisions of § 1001. The Ninth Circuit disagreed:

> To assume ... that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it ... is, in effect, to accomplish partial repeal of the general statute. Repeals by implication are not favored; effect should be given to overlapping statutes if possible.... In the present case the Government had the option of proceeding under either statute.

505 F.2d at 816 (citation omitted). *See also, e.g., United States v. Fern,* 696 F.2d 1269, 1274 (11th Cir.1983) (false statements made to an IRS auditor could be prosecuted under either § 1001 or a specific provision in the Internal Revenue Code); *United States v. Gordon,* 548 F.2d 743, 745 (8th Cir.1977) (false statements to obtain medicare payments could be prosecuted under either § 1001 or a more specific criminal statute); *United States v. Radetsky,* 535 F.2d 556, 567–68 (10th Cir.), *cert. denied,* 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976) (same); *United States v. Carter,* 526 F.2d 1276, 1278 (5th Cir.1976) (false statements in connection with Small Business Administration loan applications could be prosecuted under either § 1001 or a specific criminal provision governing the loan applications).

[8] Hansen also discerns implied repeal in a difference between 2 U.S.C. §§ 706 and 704. The latter section, entitled "Accessibility of reports," deals generally with the manner in which the public obtains access to EIGA disclosure forms. Subsection 704(e) prohibits use of the forms for certain purposes (including commercial purposes, the determination of credit ratings and the solicitation of money) and authorizes a civil action by the Attorney General, similar to that in § 706, for violation of that prohibition. Unlike § 706, however, it contains the following stipulation: "Such remedy shall be in addition to any other remedy available under statutory or common law." Hansen argues that the absence of a similar provision in § 706 shows that Congress meant *that* civil remedy to be exclusive. We think not. The two statutory sections are simply not so parallel that equivalent language in this respect would be expected. Of course 18 U.S.C. § 1001 would in any event have no application to violations of § 704, so it is surely not the continuing effect of that criminal provision that was being explicitly preserved. But more importantly, § 704, unlike § 706, addresses an area where—without the specific disclaimer—it might be thought that private civil actions were precluded, notably, state actions for defamation of credit or invasion of privacy. The language of the disclaimer seems specifically directed to civil actions, since criminal sanctions are rarely described as "remedies." In sum, we agree with the District Court that the reason for spelling out the absence of preclusion or repeal in § 704 was the possibility that otherwise its provision of a civil remedy might be held to preclude private civil actions; and that "[a]s there is no parallel private right with respect to the requirement in section 702 to file correct reports, there is no proper analogy between section 706 (which enforces section 702) and section 704." 566 F.Supp. at 165.

Appellant and *amici* point out that many statutes imposing new reporting requirements explicitly provide that the criminal penalties of § 1001 will be applicable. *See, e.g.,* the Federal Pesticide Act of 1978, 7 U.S.C. § 136h(g)(3) (1982). They infer from this a constant congressional belief that § 1001 does not apply to new reporting statutes in the absence of express provision, so that that absence here is determinative. The argument is flawed as a technical matter, because it deprives § 1001 of its plainly intended self-operative effect, reducing it, insofar as subsequently enacted reporting obligations are concerned, to no more than a shorthand code to which Congress can conveniently refer when it wishes to enact criminal penalties. And it is flawed as a plausible estimation of congressional belief, since it posits that Congress has both consistently misunderstood one of the basic rules of legislation—under which § 1001 would apply to new reporting statutes absent express provision to the contrary, *see supra* pages 944–45 and consistently ignored numerous decisions holding § 1001 applicable to reporting statutes silent on the point, *see, e.g., United States v. Burnett, supra.* A much more likely explanation is that Congress included the references to § 1001 as a means of reminding those subject to the new laws of the self-operative, previously enacted sanctions, or as a means of clarifying for its own Members who voted upon the new laws the consequences of their action.

Even if one thinks the references were included for their operative effect, they necessarily establish no more than that Congress chose in some cases to make assurance doubly sure, but did not do so here. One might surmise—though it would be only a surmise—that the failure to include such redundancy in the EIGA was not mere happenstance, but was rather attributable to the belief that some Members of Congress, and perhaps even a number providing the crucial margin for passage of the bill, would have objected to the inclusion. But even if true this falls far short of establishing a belief on the part of Congress as a whole that § 1001 was not independently applicable.

[9, 10] There is one other arguable textual indication of repeal, not raised by appellant or *amici*, but worthy of attention: 2 U.S.C. § 705(b), which provides for advisory opinions interpreting the EIGA to be issued by the designated committees of the House and Senate, prescribes that any individual "who, after the issuance of the advisory opinion, acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of such act, be subject to any sanction provided *in this chapter.*" (Emphasis added.) Since it can hardly be thought that Congress meant the advisory opinion to be a protection against the civil sanctions of the EIGA but not against the criminal penalties of 18 U.S.C. § 1001, the italicized limitation arguably indicates a belief that § 1001 is not applicable. The point would have great force if, by reason of the limitation of the provision to sanctions "in this chapter," an advisory opinion would in fact not immunize against § 1001 criminal prosecution. But that is obviously not so. Good faith reliance upon advice of counsel would establish a defense against § 1001, *see United States v. Smith*, 523 F.2d 771, 778 (5th Cir.1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976); reliance upon a specifically authorized pronouncement of one of the designated committees would *a fortiori* do so. The limitation of the immunization to sanctions "in this chapter" thus creates no legislative absurdity, and is at most weak evidence of a belief that § 1001 does not apply. It may have been included simply because that is the routine formulation (so routine that it did not attract the attention of appellant and *amici* here); or because it was thought necessary to establish this defense against the new civil sanctions, but superfluous to do so against the criminal penalty of § 1001, with its well-established requirements of *mens rea*, *see, e.g., United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975).

Finally, Hansen relies upon certain portions of the legislative history of the EIGA. We will not review them at length, since they are set forth and discussed fully in the opinion of the District Court. As the District Court found, while there is categorical indication in the legislative history that some Members of Congress believed § 1001 would apply by its terms to an EIGA violation, there is no *unequivocal* indication that *any* Member of Congress thought the contrary. Fairly read, however, several statements suggest the latter belief. But even if they are fully credited, they do not establish that as the belief of Congress by the "clear and manifest" evidence the Supreme Court has instructed us to require. Reading the legislative history in the light most favorable to Hansen, it reveals that both the Clerk of the House and the Department of Justice—the latter speaking to one proposed version of the EIGA that did not contain its own criminal penalty, and three proposed versions that did (which, as observed earlier, would even more strongly suggest preclusion of § 1001)—expressed to the relevant House committee the view that § 1001 would apply;[3] that the criminal sanction provisions included in earlier House and Senate versions of the EIGA were dropped from the final bill, with the explanation by one of the bill's proponents in the House that it was done "to get the bill through the House," 124 Cong.Rec. 30,457 (1978) (remarks of Rep. Bauman); and that in the House debate several Members expressed views indicating a belief that § 1001 would not apply to EIGA violations, *see, e.g., id.* at 30,414 (remarks of Rep. Danielson), 30,415 (remarks of Rep. Moorhead), while two Members (one an opponent and one a supporter of the bill) stated explicitly their belief that it would, *see id.* at 30,429 (remarks of Rep. Wiggins), 30,444 (remarks of Rep. Thompson). We simply cannot see in this a "clear and manifest" indication of congressional belief that § 1001 was excluded. To the contrary, the pattern is entirely consistent with the sort of legislative gamesmanship we described earlier, in which some Members of Congress were gambling on the expectation that § 1001 would be precluded, and others (who favored criminal penalties) were gambling on the opposite. The weakness of indication of legislative intent is highlighted when one realizes that all the expressions of views described in the foregoing legislative history pertain only to the House. We have no indication beyond the text of the statute what members of the Senate thought on this issue. For all we know, they may have receded from the criminal penalties adopted in the Senate version of the bill, *see* S. 555, 95th Cong., 1st Sess. (1977), U.S.Code Cong. & Admin. News 1978, p. 4216, *reprinted in* 123 Cong. Rec. 21,017 (1977), only because they thought it certain or likely that § 1001 applied anyway. Precisely that explanation is suggested by the curious failure of the Joint Explanatory Statement of the Committee of Conference to mention the elimination of criminal penalties, *see* H.R. Rep. No. 1756, 95th Cong., 2d Sess. 65–69 (1978), U.S.Code Cong. & Admin.News 1978, p. 4381, and by the curious description of the conference outcome reported to the House floor by one of the conferees: "As in the House version, *specific reference* to criminal penalties was removed from this legislation." 124 Cong.Rec. 36,467 (1978) (remarks of Rep. Moorhead) (emphasis added).

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[3] The Department of Justice's advice, contained in a letter from Assistant Attorney General Wald to the Chairman of the House Select Committee on Ethics, addressed application of § 1001 only to Executive Branch employees, though the Clerk's advice, recited in that letter, specifically addressed its application to Members of Congress. *See* J.A. 448–50. In any case, insofar as

The District Court reached "[t]he inescapable conclusion ... that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports." 566 F.Supp. at 168–69. *Accord, United States v. Claiborne,* No. CR–R–83–57–WEH (D.Nev. unpublished transcript of Mar. 13, 1984 proceedings). We need not go that far. It suffices that there is not remotely—neither in the textual indications we have considered, nor in the various episodes of legislative history, nor in all of them combined—a *clear and manifest* indication of an intent to repeal.

Hansen appeals to the so-called rule of lenity: "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. Bass,* 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (quoting *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971)). It is, quite frankly, difficult to assess the scope of this accepted principle. One can recite, as appellee has, the Supreme Court's advice that it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan v. United States,* 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961) (footnote omitted). But in truth that provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity. In the present case, however, we think the answer is plain. When faced with questions of interpretation relating to § 1001, pertaining to matters at least as "ambiguous" as the alleged repealer here, and not even involving the presumption against implied repeal, the Supreme Court has found

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the issue of implied preclusion of § 1001 is concerned, there is little if any ground for distinction between the two applications.

the rule of lenity inapplicable. *See United States v. Yermian*, — U.S. —, 104 S.Ct. 2936, 2940 n. 7, 82 L.Ed.2d 53 (1984); *United States v. Rodgers*, 104 S.Ct. at 1948–49. Moreover, to the extent the rule is based upon solicitude for the individual defendant who violates the law before its meaning is clarified, rather than upon some more general notion that in case of doubt Congress should not be deemed to have unsheathed the sword of criminal penalty, it has no valid application here. Hansen has not only not been surprised by a novel or unexpected interpretation of the law, *cf. United States v. Mallas*, 762 F.2d 361, 363 (4th Cir.1985), but was in fact warned of its application with a specificity that a prospective lawbreaker rarely enjoys. The forms that Hansen signed all contained a warning, immediately above or below the signature line, that "[a]ny individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. § 706 and 18 U.S.C. § 1001."

III

[11, 12] Hansen contends that even if § 1001 applies to his EIGA filings, he has not violated that statute because the omissions from his forms were not "material." The portion of § 1001 under which Hansen was charged, *see supra* page 942, does not explicitly require a showing of materiality, but we have held that requirement to be implicit, *see Freidus v. United States*, 223 F.2d 598, 601 (D.C.Cir.1955). As we have described the requirement:

> The test of materiality is whether the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

United States v. Diggs, 613 F.2d at 999 (quoting *Weinstock v. United States*, 231 F.2d 699, 701–02 (D.C.Cir.1956)) (footnote omitted). Hansen argues that his omissions could not have been material because no federal agency or department "was conducting any inquiry or investigation, or making any determination whatever, that would have been affected in the slightest if Congressman Hansen had, in 1979, 1980, 1981 and 1982 put on his EIGA forms the debts and transactions which the indictment alleges he should have reported." Brief for Appellant at 53. This argument misunderstands the nature of the materiality requirement: A lie influencing the possibility that an investigation might commence stands in no better posture under § 1001 than a lie distorting an investigation already in progress. *See United States v. McIntosh*, 655 F.2d 80, 83 (5th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1450, 71 L.Ed.2d 662 (1982) (false statement material because "disclosure of the truth could have provoked the agency to action"). And it is beyond doubt that information contained on (or omitted from) EIGA forms could in some cases influence the possibility of an authorized investigation by a federal department. As noted earlier, House committees are federal departments for the purposes of § 1001. As required by 2 U.S.C. § 703(d)(1), the reports filed by Hansen with the Clerk of the House were forwarded by him to the "designated committee" of the House, the Committee on Standards of Official Conduct. That is the committee charged by the House with the duty, among others, "to investigate ... any alleged violation, by a Member, officer, or employee of the House, of the Code of Official Conduct or of any law, rule, regulation, or other standard of conduct ... and after notice and hearing, to recommend to the House, by resolution or otherwise, such action as the committee may deem appropriate ...." House Rule X, cl. 4(e)(1)(B). House Rules restrict in some respects the receipt by Members of money in the form of gifts or income (Rules XLIII, cl. 3; XLII, cl. 4; XLVII) and require Members to behave in a fashion which "shall reflect creditably on the House of Representatives" (Rule XLIII, cl. 1). The Standards Committee's rules require its staff to "present to it any evidence available to the staff reasonably indicating that any Member ... may have committed a violation" of these House Rules, and provide that the Committee shall conduct an investigation if it determines that that evidence merits further inquiry. Committee Rule XIII. Thus, the statute and the House and Committee Rules combine to authorize examination of EIGA forms and consequent investigation to detect violations of House ethical standards.

[13] Further addressing the "materiality" point, Hansen asserts that there was no indication that his omissions had, in the words of *Diggs, supra*, a "natural tendency to influence" any investigation, whether ongoing or potential. There is no doubt that specific disclosure of the actual transactions in question would have had such a tendency: after they came to light, the Committee undertook an investigation and concluded that the transactions violated House Rules. *See In the Matter of Representative George V. Hansen*, H.R.Rep. No. 891, Vol. 1, 98th Cong., 2d Sess. 2, 325-26, 388, 425 (1984). Hansen's point, however, is that because of the nature of the EIGA forms the required disclosure would have been too general to have influenced any investigation or action. With respect to one of the omitted transactions, a bank loan to his wife cosigned by Nelson Bunker Hunt, he notes that the only effect of including the omitted material would have been to add one more line to his form for 1978: "First National Bank of Dallas III" ("III" indicates indebtedness from $15,000 to $50,000). This, he argues, would not remotely have disclosed that aspect of the transaction which presumably violated House Rules (the fact that Hunt was guarantor of the loan) and thus would have had no "natural tendency" to provoke Committee investigation or action. Assuming that this correctly describes the reporting requirement (which is by no means clear),[3] Hansen has selected, of course, the example best suited to his case; the other required disclosures would have been much more informative. We are of the view, however, that even a falsification of this sort comes within § 1001. The materiality requirement that we have found implicit in that provision excludes a matter unrelated to the subject of the agency's or department's responsibility—for example, misrepresenting the occupation of a corporate director where that is irrelevant to the determination at hand, *see, e.g., United States v. Talkington*, 589 F.2d 415, 417 (9th Cir. 1978). But where, as here, the falsification pertains specifically to the area the department is charged to investigate (a filing Member's financial transactions), and tends to conceal in any degree—even beyond the point where further concealment might be thought superfluous—material that would prompt or affect an investigation, we will look no further. Application of § 1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot. Here the falsifications related to financial transactions within the Committee's charge, and tended to conceal information that would have prompted investigation or action; no more is needed.

Hansen further argues that the District Court improperly withheld this materiality question from the jury. We have previously held, however, that materiality under § 1001 is a matter of law to be determined by the court. *See Weinstock v. United States*, 231 F.2d at 703. A majority of the circuits has reached the same conclusion. *See, e.g., United States v. Lopez*, 728 F.2d 1359, 1362 n. 4 (11th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984); *but see, e.g., United States v. Irwin*, 654 F.2d 671, 677 n. 8 (10th Cir.1981),

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[3] *See* 2 U.S.C. § 702(d)(1)(B), requiring, in some cases, the reporting of gifts to spouses and the identification of donors. A gift is defined as a "rendering ... of ... any thing of value," 2 U.S.C. § 707(3). Free use of the credit of Nelson Bunker Hunt, which his cosignature of the loan conferred, was assuredly something of value.

cert. denied, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982).

IV

Hansen alleges that his trial did not commence within the time limits of the Speedy Trial Act, 18 U.S.C. §§ 3161–74 (1982). The seventy-day time period specified in the Act was due to expire on February 24, 1984. On January 26, Hansen agreed to a trial date of March 19, 1984, thereby waiving his right to have the trial start sooner. The trial did not commence until March 20.

[14] Virtually all of the time from January 26 to March 19, however, was excludable for purposes of the Speedy Trial Act's seventy-day time calculation. The Act provides in 18 U.S.C. § 3161(h)(1)(F) that periods of delay "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" may be excluded from the seventy-day period. During almost the entire period from January 26 to March 19, numerous pretrial motions filed by the government and Hansen were under consideration by the court. Likewise during this period, the Clerk of the House of Representatives filed a motion to quash a subpoena in the case, which the court considered for several weeks. Hansen asserts that delays arising from such motions had already been envisioned in the court's fixing, and the defendant's acceptance, of the March 19 date, so that that date had to be regarded as subject to no further extensions permitted by the Speedy Trial Act. Although the trial judge's order setting the trial date of March 19 did state that the extension would "allow the filing or revival of anticipated motions which might well require substantial responses by the parties," *United States v. Hansen,* Crim. No. 83-00075, slip op. at 2 (D.D.C. Jan. 27, 1984), it seems to us most unlikely that the experienced trial judge here meant to imply that the extension was final and absolute. That would have displayed a foolhardy confidence in her ability precisely to calculate the time needed to dispose of yet-unforeseen pretrial matters—such as the defendant's last-minute motion for change of venue because of prejudicial publicity, which induced the trial court to require a sequestered jury, arrangements for which caused delay of the trial from March 19 to March 20. Assuming, however, that that was what the extension to March 19 meant, the consequence of the failure to comply with it would simply be retraction of the defendant's waiver of speedy trial rights that was the *quid pro quo.* The District Court would have no authority to create a mini-Speedy Trial Act by judicial fiat, binding itself to dismissing the prosecution in advance of the time the Speedy Trial Act would allow, and even against its own judgment of what justice required. At most, then, Hansen reacquired his previously waived Speedy Trial Act rights on March 20. Since those rights would still not have entitled him to dismissal, because of the tolling of the seventy-day period described above, commencement of the trial on March 20 was lawful.

* * * * * *

We have carefully considered all of Hansen's other arguments and find them to be without merit, substantially for the reasons given by the District Court in its rulings and opinions below. We affirm the conviction on all counts.

So ordered.

UNITED STATES of America, Appellee,

v.

Ronald L. ESTUS, Appellant.

No. 76-1455.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 15, 1976.

Decided Nov. 3, 1976.

Defendant was convicted in the United States District Court for the Eastern District of Arkansas, Terey L. Shell, J., of seven counts of violating statute prohibiting making of false statements in that defendant had submitted false sick leave request while employed as a mail clerk in the United States Postal Service, and defendant appealed. The Court of Appeals held that federal statute prohibiting making of false statements by an individual in any matter within jurisdiction of any department or agency of the United States was applicable to government employees and private individuals alike and was applicable to defendant.

Affirmed.

1. Fraud ⇐68.10(1)

Federal statute prohibiting person in any matter within jurisdiction of any department or agency of United States from knowingly and willfully making any false, fictitious or fraudulent statements or representations, as well as statute's predecessor, was intended to cover government employ-

ees and private individuals alike. 18 U.S. C.A. § 1001.

2. Fraud ⟹68.10(3)

Federal statute prohibiting any individual in any matter within jurisdiction of any department or agency of United States from knowingly and willfully making any false, fictitious or fraudulent statements or representations applied to false statements made by postal service employee to post office. 18 U.S.C.A. §§ 1001, 1712; 39 U.S. C.A. §§ 101 et seq., 410, 410(b)(2).

3. Fraud ⟹68.10(3)

Amendment of federal statute prohibiting falsification of postal returns to increase compensation was intended to make terminology of statute consistent with other provisions of Postal Reorganization Act, but no change in substance was intended, so that such section was not exclusive remedy against mail clerk in United States Postal Service who had submitted false sick leave requests and did not preclude prosecution under statute prohibiting making of false statements. 18 U.S.C.A. §§ 1001, 1712; 39 U.S.C.A. §§ 101 et seq., 410, 410(b)(2).

Andrew L. Clark, Little Rock, Ark., on brief, for appellant.

W. H. Dillahunty, U. S. Atty., and Kenneth F. Stoll, Asst. U. S. Atty., Little Rock, Ark., on brief, for appellee.

Before LAY, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

Ronald L. Estus was convicted after a jury trial on seven counts of an eight-count indictment charging him with submitting false sick leave requests while employed as a mail clerk in the United States Postal Service in violation of 18 U.S.C. § 1001. Appellant's sole contention on appeal is that § 1001 is not applicable to false statements made by Postal Service employees to the Postal Service and consequently, that the indictment was defective and should have been dismissed.

Section 1001 reads in pertinent part as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more that $10,000 or imprisoned not more than five years, or both.

[1] It is appellant's theory that false statements made by government employees concerning the internal affairs of the agency or department involved are not within the purview of § 1001. This contention is without merit. Section 1001 and its predecessor, former § 80, have been construed to provide an overall penalty for fraud upon the government no matter what other, more specific statutes may provide, *see, e. g., United States v. Gilliland*, 312 U.S. 86, 93, 61 S.Ct. 518, 85 L.Ed. 598 (1941); *United States v. Librach*, 520 F.2d 550, 556 (8th Cir. 1975); *United States v. Burnett*, 505 F.2d 815, 816 (9th Cir. 1974), and no matter whether the false statement is made by a government employee or private individual, *see, e. g., Stein v. United States*, 363 F.2d 587, 590 (5th Cir. 1966). Government employees have been indicted and convicted under § 1001 even as to falsifications made in the course of their official duties, *see, e. g., United States v. Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *United States v. Eisenmann*, 396 F.2d 565 (2d Cir. 1968); *United States v. Myers*, 131 F.Supp. 525, 531 (N.D.Cal.1955).

Defendant's principal contention urged for reversal is that 39 U.S.C. § 410, which was enacted as part of the 1970 Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq.*, evidences a congressional intent to exclude employees of the newly reorganized Postal Service from the purview of § 1001. We disagree. Section 410 provides in pertinent part as follows:

> (a) Except as provided by subsection (b) of this section, and except as other-

> wise provided in this title * * *, n Federal law dealing with public or Federal contracts, property, works, officers employees, budgets, or funds, including the provisions of chapters 5 and 7 of titl 5, shall apply to the exercise of the powers of the Postal Service.
>
> (b) The following provisions shall apply to the Postal Service:
>
> (1) * * *
>
> (2) all provisions of title 18 *dealing with* the Postal Service, the mails, and officers or employees of the Government of the United States.

39 U.S.C. § 410 (emphasis added).

[2] H.Rep. 91-1104, U.S.Code Cong. and Admin.News, pp. 3649, 3675 (1970) states that "[t]he provisions of the criminal laws *applicable to* the Postal Service, the mails, and Government employees" (emphasis added) are made specifically applicable to the Postal Service by section 114 (now 39 U.S.C. § 410) of the Act. As previously discussed, section 1001 is applicable to government employees and private individuals alike, and as such, is made specifically applicable to the Postal Service by § 410(b)(2).

[3] In support of his contention that section 1001 is not applicable to Postal employees, appellant points to 18 U.S.C. § 1712[1] as the exclusive remedy against employees of the Postal Service who falsify Postal Service records. Section 1712, which was originally enacted in 1948, was, at the time of the 1970 Postal Reorganization Act, amended to make its terminology consistent with the other provisions of the Act. No change in substance was intended. Appellant's position that the Postal Reorganization Act made section 1712 the exclusive remedy is therefore untenable.

The judgment of the district court is affirmed.

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[1] § 1712. Falsification of postal returns to increase compensation

Whoever, being a Postal Service officer or employee, makes a false return, statement, or account to any officer of the United States, or makes a false entry in any record, book, or account, required by law or the rules or regulations of the Postal Service to be kept in respect

UNITED STATES of America

v.

Charles T. MUNTAIN, a/k/a "Red
Muntain", Appellant.

No. 78-2150.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 24, 1979.

Decided Oct. 31, 1979.

Defendant was convicted in the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., on eight counts of a 13-count indictment charging him with various sorts of improper conduct by a public official, and he appealed. The Court of Appeals, Larson, Senior District Judge, sitting by designation, held, inter alia, that the evidence was sufficient to support defendant's conviction of knowingly concealing his involvement in a group automobile insurance venture when completing annual confidential statements of employment and financial interests.

Affirmed in part and reversed and remanded in part.

1. Bribery ⇐11

Conviction of Assistant to Secretary for Labor Relations for United States Department of Housing and Urban Development under federal bribery statute proscribing receipt by public official of any-

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66. See *United Steelworkers v. Marshall,* 592 F.2d 693, 698 (3d Cir. 1979) (desirability of having one court review air standards for lead respectively issued by Department of Labor and Environmental Protection Agency prompted court to transfer petitions for review of Department's action to this circuit, where review of Agency's national ambient air standards must be had).

thing of value "for or because of an official act performed or to be performed by him" was not supported by evidence that defendant promoted group automobile insurance plan with labor officials and encouraged HUD subordinates to assist in such promotion, since such activities did not constitute "official acts" within meaning of bribery statute. 18 U.S.C.A. § 201(a, g).

See publication Words and Phrases for other judicial constructions and definitions.

2. United States 🔑39(5)

Although evidence showed that defendant, high-ranking official in executive branch, received contribution from source outside government when he accepted payment for trip to Ireland made by himself and his wife, no violation was shown of statute prohibiting officer or employee of executive branch from receiving salary or contribution or supplementation of salary from any source other than United States as compensation for services as employee of United States where record showed clearly that payment was for services having nothing to do with government business or with any responsibilities defendant may have had to government as employee of United States. 18 U.S.C.A. § 209.

3. Conspiracy 🔑47(6)

Conviction of government official on charges of conspiring to defraud United States could not be sustained where evidence failed to show any intent on part of any of alleged conspirators either to interfere with official's performance of official services or acts required in connection with his official position or to have him perform official acts in furtherance of allegedly improper group automobile insurance scheme and, instead, established affirmatively that alleged conspirators believed any actions taken by defendant in furtherance of insurance scheme would be totally unrelated to his official duties. 18 U.S.C.A. § 201(g).

4. Fraud 🔑69(5)

Conviction of government official on charges of improperly concealing involvement in group automobile insurance venture when completing annual confidential statements of employment and financial interests required by agency which employed him was proper where evidence established that such insurance venture constituted "business enterprise" which was subject to such disclosure requirements. 18 U.S.C.A. § 1001.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the District of Columbia (D.C. Criminal No. 78–00172–01).

Plato C. Cacheris with whom Larry S. Gondelman, Washington, D. C., was on the brief, for appellant.

Michael J. Ryan, Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., John A. Terry, Michael W. Farrell and Robert Richard Chapman, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee.

Also William J. Birney, Asst. U. S. Atty., Washington, D. C., entered an appearance for appellee.

Before ROBINSON and WILKEY, Circuit Judges, and LARSON,[*] United States Senior District Judge for the District of Minnesota.

Opinion for the Court filed by Senior District Judge LARSON.

LARSON, Senior District Judge:

Defendant Charles T. Muntain appeals his conviction on eight counts of a thirteen count indictment charging him with improper conduct, in violation of 18 U.S.C. §§ 201(g), 209, 371, and 1001. At the time of his conviction Muntain was the Assistant to the Secretary for Labor Relations for the United States Department of Housing and Urban Development (HUD). Four of the counts on which Muntain was convicted (Counts 5, 7, 9, and 11) alleged that on several occasions the defendant, "being a public official . . . unlawfully and knowingly did, directly and indirectly, ask, demand, solicit and receive for himself . . ." illegal gratuities "for and because of official acts . . . .", in violation of 18 U.S.C. § 201(g). Under Count 3 of the indictment Muntain was further convicted of having received an illegal contribution to his salary from a source other than the United States Government, in violation 18 U.S.C. § 209.

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[*] Sitting by designation pursuant to 28 U.S.C. § 292(d) 1976

Count 1 charged defendant with violating 18 U.S.C. § 371 by participating in a conspiracy having two objects: (1) to defraud the United States of the "conscientious, loyal, faithful, disinterested and unbiased services, actions and performances of official acts and duties" by the defendant free from concealed interests; and (2) to violate 18 U.S.C. § 201(g). Finally, defendant was convicted on Counts 4 and 13 of having filed false statements with HUD which concealed his involvement in the automobile insurance venture.

Following his conviction by a jury, defendant moved for a judgment of acquittal or, in the alternative, a new trial. The Court denied both motions and imposed a suspended sentence, placing defendant on five years probation.[1] From that judgment, defendant appeals. For reasons to be discussed, we affirm in part and reverse in part the decision of the Court below.

The Government's case against Muntain was based upon his involvement in a private scheme to sell group automobile insurance to labor unions as a negotiated benefit in union contracts at a time when he was employed as the Assistant to the Secretary for Labor Relations at HUD. In his capacity at HUD, Muntain functioned as the principal labor relations policy advisor and consultant to the Secretary, the chief liaison between HUD and organized labor and the chief Department spokesman on labor relations matters. His responsibilities at HUD brought Muntain into frequent contact with contractor associations, trade associations and unions regarding labor relations and labor relations policies affecting programs and projects within HUD's jurisdiction. The Government did not contend and produced no evidence at trial, however, to suggest that automobile insurance as a benefit for labor unions fell within HUD's jurisdiction.

The plan to sell automobile insurance with which Muntain became involved originated with an agreement negotiated by Charles Cordial, an unindicted coconspirator in this case, with a company called Group Marketing Consultants, Inc. (GMCI). Under this agreement, Cordial and Deryl Fleming, another unindicted coconspirator, became consultants to GMCI to assist in the mass marketing of group auto insurance. Within a month after signing the agreement with GMCI in February 1974, Fleming and Cordial contacted Muntain in Washington to obtain his assistance in marketing group automobile insurance to labor unions. Both Fleming and Cordial testified at trial that they sought Muntain's help because he knew labor people and they hoped that he would open doors for them by introducing them to these people. In exchange for his assistance, Muntain was to be reimbursed for any expenses he incurred. In addition, he was to share equally in any commissions that might be generated from the sale of insurance. Cordial and Fleming both testified that, pursuant to an oral agreement entered into in early 1974 and later reduced to writing, it was understood that Cordial, Fleming and Muntain were to be equal partners in the group automobile insurance venture.

In the ensuing months during 1974 and 1975, Muntain arranged and participated in a number of meetings around the country with labor officials at which Fleming and Cordial were introduced and the concept of group automobile insurance discussed. Many of these same labor officials, according to testimony, had dealings with HUD concerning official HUD business. In fact, Muntain would frequently combine the promotion of the automobile insurance with trips taken at government expense for the purpose of conferring with labor officials across the United States concerning official business. In connection with at least some of the trips paid for by the Government, evidence was introduced suggesting that Muntain requested and received supplementary "reimbursement" from Cordial and Fleming for expenses he claimed were incurred in arranging and attending meetings to promote the insurance plan.

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[1] As part of the terms of his probation, defendant was required by the Court to contribute 100 hours of community service work without compensation as directed by the Probation Officer of the Court.

In addition to his domestic travels, Muntain, accompanied by his wife, took a ten day trip to Ireland in May 1974 as part of a charter tour organized by the International Laborers Union. This trip, which formed the basis for Count 3 of the indictment, was taken at the insistence of Fleming and Cordial who testified that they wanted Muntain along to introduce them to the labor officials who would be going on the trip. At the time of the trip, Muntain was on annual leave from his position at HUD.

The final evidence relevant to defendant's appeal consists of testimony and documentary evidence that in June of 1974 and again in 1975 defendant caused to be filed with the Office of General Counsel at HUD a Confidential Statement of Employment and Financial Interests which failed to disclose defendant's involvement in the group automobile insurance enterprise.

[1] The first of the statutory provisions under which Muntain was convicted, 18 U.S.C. § 201(g), proscribes the receipt by a public official of anything of value "for or because of an official act performed or to be performed by him."[2] "Official act" in turn is defined in § 201(a) as:

> "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

At trial the Government contended that Muntain's efforts to promote, or to assist Fleming and Cordial in promoting, the group automobile insurance plan with labor officials, and his encouragement of HUD subordinates to assist in that promotion, fall within the proscription of § 201(g). Muntain argues on appeal, however, that none of his activities undertaken in furtherance of the insurance scheme constitute "official acts" within the meaning of § 201(a) and, therefore, he cannot be held to have violated § 201(g).

Specifically, Muntain contends that his meetings with labor officials concerning the insurance scheme were not "official acts" because there is no evidence that these meetings involved any question, matter, cause, suit, proceeding or controversy which by law might have been brought before Muntain in his official capacity as Assistant to the Secretary for Labor Relations at HUD. It is undisputed that HUD has no responsibility for the development, administration, evaluation or promotion of group automobile insurance for labor unions. The Government, however, urges this Court to construe the scope of "official acts" to encompass any acts within the range of an official's public duties, broadly defined, including, in the instant case, any meeting between the Assistant to the Secretary for Labor Relations at HUD and labor union officials to discuss matters of interest to the unions. In essence, the Government would have this Court construe 18 U.S.C. § 201(g) as a statutory prohibition against the misuse of public office and contacts gained through that office to promote private ends.

To construe the statute in the manner advocated by the Government is we think, to extend its language beyond permissible bounds.[3] To the extent that defendant

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[2] 18 U.S.C. § 201(g) provides in pertinent part:

> "Whoever, being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; . . . [s]hall be fined not more that $10,000 or imprisoned for not more than two years, or both."

[3] The Government cites *United States v. Birdsall*, 233 U.S. 223, 34 S.Ct. 512, 58 L.Ed. 930 (1914), in support of its proposed broad reading

Muntain's use of his official position to promote a purely private venture created an appearance of impropriety, his conduct is reprehensible, but it is not criminal within the strictures of § 201(g). Section 201 of Title 18 is an anti-bribery statute aimed at preventing public officials from accepting anything of value in exchange for particular decisions or actions taken or to be taken by the public officials in their official capacity. The foundation of the Federal bribery statute has been described in the following terms:

> "It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government." *United States v. Heffler*, 402 F.2d 924, 926 (3rd Cir. 1968), *cert. denied sub nom. Cecchini v. United States*, 394 U.S. 946, 89 S.Ct. 1280, 22 L.Ed.2d 480 (1969), quoting *United States v. Labovitz*, 251 F.2d 393, 394 (3rd Cir. 1958).

It is the corruption of official decisions through the misuse of influence in governmental decision-making which the bribery statute makes criminal.

In the instant case there was no evidence that Muntain's meetings with labor officials to discuss and promote group automobile insurance involved a subject which could be brought before Muntain—or, for that matter, anyone else at HUD—in an official capacity. There was, therefore, no apparent danger that the receipt of gratuities from Fleming or Cordial in connection with the group automobile insurance scheme would induce Muntain to act improperly in deciding a HUD-related matter. Accordingly, 18 U.S.C. § 201(g) simply does not apply.

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of "official acts." In *Birdsall*, the Supreme Court stated that:

> "Every action that is within the range of official duty comes within the purview of these sections [antecedents of § 201] . . . In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the statutes against bribery [now § 201]." 233 U.S. at 230-31, 34 S.Ct. at 514.

The quoted language establishes clearly that "official acts" are not to be limited to those duties set forth in a written job description but may include as well those duties customarily associated with a particular job. In the instant case, however, no evidence was introduced to suggest that the responsibilities of the Assistant to the Secretary for Labor Relations at HUD have been expanded by settled practice or otherwise to include meeting with labor union officials concerning group automobile insurance.

Recent opinions that have depended on an interpretation of "official act" have sustained convictions only where allegedly illegal payments were made for actions or decisions involving matters falling indisputably within the ambit of a public official's official duties. Thus, for example, in *United States v. Carson*, 464 F.2d 424 (2d Cir. 1972), a case upon which the Government relies heavily, the defendant received money in return for approaching an official of the Justice Department in an effort to quash a pending action by that Department. At the time of his indictment, the defendant was the administrative assistant to Senator Fong, a member of the Senate Judiciary Committee, the activities of which affect directly the operation of the Justice Department. In *Carson* there was, moreover, testimony from the defendant himself that "as part of his job and under the applicable procedure that goes on at Capitol Hill, he, as an administrative assistant to Senator Fong, would exert influence on various agencies and branches of the Government . . . ." 464 F.2d at 434. Based upon this explanation of the scope of defendant's duties, the Second Circuit found that defendant's attempt to influence the Justice Department fell within the ambit of his official duties. A similar approach has been used when defining "official acts" in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) (HEW official with responsibilities for student loan program received payments from a private collection agency which had and sought contracts for the collection of delinquent loans); *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978) (loan officer with Small Business Administration paid by applicant for SBA loan); and *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976) (Administrator of Federal prison paid by son of prison inmate).

The Government's allegations concerning Muntain's efforts to encourage his subordinates at HUD to assist in promoting group automobile insurance may appear to present a closer case on first impression since there is no question that, in his official capacity, Muntain could and did direct subordinates at HUD in the performance of certain duties. There is also apparently no question that on at least two occasions Muntain directed his subordinates to assist Fleming and Cordial in promoting the insurance scheme with labor unions and that Muntain was reimbursed for his expenses in this regard. The crucial question under § 201(g), however, is whether in directing his subordinates to act, Muntain himself engaged in an "official act." Under the analysis applied above, the determinative factor is whether Muntain's actions involved a matter or issue that could properly, by law, be brought before him as Assistant to the Secretary for Labor Relations at HUD. Since the promotion of group automobile insurance was not such a matter, we conclude that no official act occurred and, hence, 18 U.S.C. § 201(g) cannot be invoked.

[2] Under Count 3 of the indictment, Muntain was charged with violating 18 U.S.C. § 209 by having knowingly received $800 as "a contribution to, and a supplementation of, the salary he received from the United States Government as compensation for his services as the Assistant to the Secretary for Labor Relations . . . from a source other than the Government of the United States . . . ." The $800 was paid to Muntain by Fleming as reimbursement for expenses incurred in connection with the labor trip to Ireland taken by Muntain and his wife in May 1974 at the request of Fleming and Cordial.

Section 209 of Title 18 prohibits an officer or employee of the executive branch or an independent agency of the United States from receiving a salary, or any contribution to or supplementation of salary, from any source other than the United States as compensation for services as an employee of the United States.[4] In the instant case there can be no dispute that defendant, a high-ranking official in the executive branch, received a contribution from a source outside the Government when he accepted payment for the Ireland trip. For there to be a violation of § 209, however, the contribution must have been received as compensation for "services" and those services must have been "rendered as an employee of the United States." With respect to the first requirement, the $800 received by Muntain in connection with the Ireland trip was allegedly paid as reimbursement for the cost of the two airplane tickets used by Muntain and his wife. As such it might be argued that the $800 was reimbursement for "expenses" and not compensation for "services" within the meaning of § 209. Whatever merit this argument may have as to the $400 representing the cost of Muntain's own air fare, the Court does not believe that the $400 representing the cost of the ticket used by Mrs. Muntain can fairly be characterized as compensation for expenses incurred by defendant in the course of promoting the group automobile insurance plan. There was absolutely no evidence presented at trial that suggested that Mrs. Muntain's presence on the trip was in any way essential to the promotion of the automobile insurance scheme. Therefore, the jury could reasonably conclude that the cost of Mrs. Muntain's air fare constituted a reward or bonus paid to Muntain, above and beyond reimbursement for his own legitimate expenses, as compensation for services he had provided or was expected to provide in promoting the automobile insurance venture.

While it would be possible to satisfy the first requirement of § 209 by the reasoning just suggested, the second requirement presents an insurmountable obstacle to conviction in this case The record on appeal indicates clearly, we think, that the payment to Muntain was for services having nothing to do with HUD business or with any responsibilities Muntain may have had to the Government as an employee of the United States.[5] Indeed, at the time of the trip, Muntain was on leave from his Government position. Since the payment of the cost of the Ireland trip bore no relation to governmental services, there can be no violation of 18 U.S.C. § 209.

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[4] 18 U.S.C. § 209 provides in pertinent part: "(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, . . . from any source other than the Government of the United States, . . . [s]hall be fined not more than $5000 or imprisoned not more than one year, or both."

[3] Under Count 1 of the indictment Muntain was convicted of having conspired to defraud the United States and to violate 18 U.S.C. § 201(g).[6] In order to find a conspiracy, there must be evidence of an intent on the part of two or more persons to achieve the illegal object of the conspiracy. *See United States v. Feola*, 420 U.S. 671, 686, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). In the instant case, conviction under either prong of the conspiracy count can be sustained only upon a finding of an intent to influence an official act. Section 201(g) explicitly requires the receipt of something of value "for or because of any official act performed or to be performed." Under the other prong of Count 1, Muntain was charged with having conspired to deprive the United States of his faithful and unbiased "services, actions and performances of official acts and duties."

A review of the record in this case reveals no persuasive evidence of an intent on the part of any of the alleged conspirators either to interfere with Muntain's performance of the official services or acts required in connection with his position at HUD (first prong of the conspiracy count) or to have Muntain perform official acts in furtherance of the group automobile insurance scheme (second prong). Indeed, to the contrary, the evidence adduced at trial tends to establish affirmatively that the alleged conspirators believed any actions taken by Muntain in furtherance of the insurance scheme would be totally unrelated to his official duties at HUD.[7] Because none of the alleged conspirators contemplated that Muntain's participation in the insurance venture would either require or impinge upon official acts, the requisite intent necessary to sustain a finding of conspiracy is lacking and Muntain's conviction on Count 1 cannot stand.

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[5] An Attorney General's Opinion dealing with 18 U.S.C. § 1914, the predecessor of § 209, defines the scope of the statute as follows:

> "The statute clearly covers a salary received from a private person or source if it is paid or received as compensation or partial compensation for the *services rendered to the Government*. It has also been held to apply if the officer or employee renders the same or similar services to both the Government and a private person. . . . *It does not, however, prohibit payment for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government*. . .
> In view of the express language of the statute, its indicated scope and its obvious purpose to insure the impartiality of those who serve the Government, *it is clear that no violation of the statute arises from the mere coincidence of Government employment and the receipt of compensation from a private employer*." (Emphasis added.) 41 *Op. Attorney General*, 217.220 (May 31, 1955).

18 U.S.C. § 1914 contained language almost identical to that of § 209. Where § 1914 prohibited the receipt of payments "in connection with" the performance of Government services, § 209 merely substitutes "as compensation for" for "in connection with." The purpose of this change was simply to clarify the statute's scope. *See Senate Report No. 2213*, 83rd Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N.

[6] The general conspiracy statute, 18 U.S.C. § 371, under which Muntain was charged, provides in part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both
> . . ."

[7] Cross-examination of Charles Cordial by defense counsel established that Cordial, and apparently Muntain as well, considered Muntain's participation in the automobile insurance plan to be entirely proper because unrelated to his duties at HUD:

> Q. The question pending, Mr. Cordial, was you had an agreement oral, I take it—
> A. Yes.
> Q. —where you had a discussion with Mr. Muntain that he would endeavor to show you around and meet labor people, and in exchange for which he would get expenses, isn't that right?
> A. That is correct.
> Q. And I asked you if you thought that was improper.
> A. No, I did not.
> Q. You did not. As a matter of fact, you thought it was totally lawful, didn't you, sir?

[4] The remaining two counts on which Muntain was convicted charged him with having violated 18 U.S.C. § 1001[8] by knowingly concealing his involvement in the group automobile insurance venture when completing his 1974 and 1975 annual Confidential Statement of Employment and Financial Interests (HUD Form 844). HUD Form 844 requires employees of HUD to identify, *inter alia*:

> "the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations and educational or other institutions: (a) with which you are connected as an employee, officer, owner, director, member, trustee, partner, adviser, or consultant."

Count 4 of the indictment involved a statement filed in June 1974; Count 13 a statement filed in June 1975.

Defendant contends on appeal, as he did below, that his agreement with Fleming and Cordial to serve as a labor consultant for the mass marketing of group automobile insurance did not constitute an employment interest required to be disclosed on HUD Form 844 and that, even if it did, his failure to disclose was not willful. At trial, the Government introduced testimony of both Fleming and Cordial that, early in 1974, they entered into an oral "partnership" with Muntain involving the promotion and sale of group automobile insurance.[9] In September 1974 that oral agreement was reduced to writing.

Despite this testimony from Cordial and Fleming, Muntain asserts that there was in actuality no partnership agreement, but rather only an agreement to collaborate on a "venture" which might at some future time be transformed into a partnership or other business entity. Muntain emphasizes

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A. Yes, I did.
Q. And from time to time, you discussed with Muntain his role with these things, didn't you, sir?
A. Yes.
Q. He told you repeatedly that as long as it didn't have anything to do with HUD, he saw no conflict of interest, didn't he?
Isn't that right?
A. That's right.
Q. And it didn't have anything to do with HUD?
A. That is correct.
(Transcript at 236–37).

Deryl Fleming's testimony reflected a similar evaluation:

Q. In fact, this group auto plan had nothing to do with HUD either, did it?
A. No.
Q. Not as far as you are concerned, it had nothing to do with HUD. You were trying to sell it to private enterprise, weren't you?
A. Basically, yes.
Q. That's right. You weren't selling it to the government.
A. It could have extended to the government if I was able to sell it to the government employee unions, but that's not selling it to the government.
Q. And you weren't certainly trying to do that through Mr. Muntain?
A. No.
(Transcript at 436).

[8] 18 U.S.C. § 1001 provides in pertinent part:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[9] In response to a question concerning the nature of the oral agreement entered into in early 1974, Mr. Cordial testified that "the agreement between Mr. Muntain, myself and Mr. Fleming was that we were equal partners." (Transcript at 58). Similarly, Mr. Fleming's response when asked to characterize the "venture" that existed in June or July 1974 was "[a]ctive partnership, seeking business." (Transcript at 388).

That the basic nature of the arrangement did not change in September 1974 when the oral agreement was reduced to writing is indicated in the following exchange between counsel and Mr. Cordial:

"Q. Now, what was the nature of the agreement, Mr. Cordial, that you signed on the 12th day of September 1974?
A. The basic nature was that it stated in writing that we were equal partners . . . ."
(Transcript at 195).

that the written memorandum which reduced to writing the original oral agreement refers to the possibility of forming a partnership in prospective terms. Further, the memorandum refers to "venturers," rather than partners whose responsibilities are not set forth but are "to be determined."[10] Muntain concludes that because the venture never "got off the ground" there was nothing for him to disclose on the HUD forms in 1974 and 1975.

As further support for the proposition that no partnership existed, Muntain points out that a partnership necessarily implies equal shares among the partners and, he asserts, the relationship he had with Fleming and Cordial was far from equal in 1974 and 1975. In this regard, Muntain relies on the fact that pursuant to an agreement which Cordial entered into in February 1974 with Group Marketing Consultants, Inc., and others, Cordial and Fleming were to receive consulting fees from GMCI for their efforts in mass marketing group automobile insurance to labor unions. By contrast, Muntain only received reimbursement for expenses during the relevant time period.

This latter argument is unpersuasive in arriving at a proper characterization of the business relationship that existed between Fleming, Cordial and Muntain. Muntain was not a party to the February 1974 agreement with GMCI under which Fleming and Cordial received consulting fees. The crucial agreement for purposes of our analysis is the oral agreement entered into the following month by Fleming, Cordial and defendant and later reduced to writing. Under the terms of this agreement, Fleming, Cordial and defendant were joined equally as labor consultants, each to receive payment of expenses and commissions from, *inter alia*, GMCI. Fleming and Cordial's [illegible] accompanying this agreement, moreover, seems to indicate that each of the three parties to the agreement considered their "venture" to be, from the outset, a partnership. As such, Muntain's employment interest in the venture should have been disclosed on the HUD form.

Even if no partnership existed in a technical sense, moreover, it seems obvious that Fleming, Cordial and Muntain were engaged in an active ongoing "business enterprise" which was subject to the disclosure requirement of HUD Form 844. In this regard Muntain's contention that no formalized partnership or corporate entity existed in 1974 or 1975 misses the mark. The language used in the HUD form suggests that its drafters intended to require disclosure by HUD employees of a broad spectrum of outside business and financial interests. The form refers to such specialized legal entities as partnerships and corporations, but it also refers more generally to "business enterprises," thereby presumably including within its sweep those business arrangements, in addition to partnerships and corporations, in which a HUD employee may have an established employment interest.

Finally, Muntain's contention that his failure to disclose was, in any event, not knowing or willful appears to us unconvincing. HUD Form 844 specifically requires the disclosure by HUD employees of their status as "partners" or "consultants." If Muntain entertained doubts as to whether the group automobile insurance plan qualified as a "business enterprise" or "partnership," prudence would have dictated that he disclose his involvement with the plan. His failure to do so, in light of the obvious intended breadth of the business entities to be covered by the HUD form, appears to us sufficient to permit a jury to conclude that Muntain's actions were willful.

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[10] Defendant relies particularly on paragraphs two and four of the memorandum.

Paragraph two states:

"The venture is to operate from time to time in such forms and through whatever entities (corporations, partnerships, joint ventures, etc.) as determined by venture. It is contemplated (but not essential to this venture) that this venture shall form a corporation. In that event, each of the parties hereto shall own the outstanding stock of said corporation as follows: . . ."

Paragraph four states:

"Venturers agree to devote such time, attention, and business experience to the venture in whatever form operated as may be requested, the nature and extent of the duties to be determined from time to time by the parties with compensation to be mutually agreed upon."

Based upon the foregoing analysis, we affirm as to Counts 4 and 13. As to Counts 1, 3, 5, 7, 9 and 11, we reverse and remand with instructions to enter a judgment of acquittal.

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